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Summary record of the 12th meeting
Held at Headquarters, New York, on Thursday, 19 October 2000, at 3 p.m.

Chairman: Mr. Politi ..... (Italy)

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Agenda item 162: Establishment of the International Criminal Court (*continued*)

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00-69894 (E)

The meeting was called to order at 3.10 p.m.

Agenda item 162: Establishment of the International Criminal Court (*continued*) (PCNICC/2000/INF/3 and Add.1-2)

1. **Mr. Valdés** (Chile) said that his country had recently faced a controversy stemming from the attempt by a court of another State to arrogate to itself the power to judge cases of serious human rights violations that were being tried in Chilean courts. It was with great satisfaction that his Government had been able to show the international community that those cases were continuing to be tried in its courts, thus clearly demonstrating their independence and capacity to carry out the investigation of the crimes concerned.

2. That experience had underscored the urgent need to have an international criminal court that would recognize the preferential right of national courts to judge serious international crimes and the supplementary jurisdiction to be exercised by the international court in such cases.

3. The adoption of the Rome Statute had been a very important step towards completing the international legal framework for the Court while also reflecting the ethical and moral evolution of the international community. In establishing the Court, the world was sending a message that impunity would not be tolerated and that the perpetrators of the most serious crimes would be brought to justice.

4. His delegation was convinced that the Court should have a genuinely universal character. The efforts made by the international community at the Rome Conference and in the preparatory process leading up to it would serve no purpose if, in the final analysis, the Court represented only a small group of States. The rules governing the Court's jurisdiction required that the largest possible number of States should accept that jurisdiction if the Court was to be fully effective. To that end, his delegation would continue working to resolve the legitimate concerns of certain States which prevented them from becoming parties to the Statute.

5. At the same time, it was important to maintain the content and integrity of the Statute. No changes should be made to the delicate balances achieved in Rome during negotiations on the Relationship Agreement. His delegation attached special importance to the retention of all the rules pertaining to the jurisdiction of the Court as adopted in Rome.

6. His delegation noted the achievements made at the recent session of the Preparatory Commission at which two instruments of great significance had been adopted, namely, the Rules of Procedure and Evidence (PCNICC/2000/INF/3/Add.1) and the Elements of Crimes (PCNICC/2000/INF/3/Add.2). Both instruments supplemented the Statute without modifying it in any way.

7. Important steps remained to be taken, such as agreeing on a definition of the crime of aggression that would be acceptable to the international community, identifying the elements of that crime and determining the conditions under which the Court should exercise jurisdiction. In addition, work remained to be done on the Relationship Agreement between the Court and the United Nations. That instrument should regulate the relationship between the two entities in accordance with the Statute without in any way affecting the necessary independence of the Court.

8. The number of instruments of ratification filed to date led his delegation to believe that the Statute would soon enter into force. His Government noted with satisfaction the campaign undertaken by Canada to obtain the necessary number of ratifications. Chile expected to be in a position soon to ratify the Statute after having been one of its first signatories in September 1998.

9. **Mr. Vázquez** (Ecuador) said it was encouraging to note that the Preparatory Commission had adopted by consensus, within the established time-frame, the finalized draft texts of two important instruments provided for in resolution F of the Rome Conference, namely, the Rules of Procedure and Evidence and the Elements of Crimes.

10. After signing the Rome Statute in October 1998, his Government had carried out a process of consultation among the competent national entities. The Rome Statute had been transmitted by the Ministry of Foreign Affairs to the Congress for its consideration, a process that was continuing with a view to early ratification after the Constitutional Court had delivered the relevant opinion.

11. His delegation hoped to make a constructive contribution to the achievement of consensus on the

definition of the crime of aggression. To that end, it was in favour of the Preparatory Commission holding two additional two-week sessions in 2001.

12. **Mr. Bocalandro** (Argentina) said that his delegation had supported the establishment of the Court from the outset and had worked intensively to that end with other delegations and organizations. It was to be hoped that the current stage — the Rome Statute's ratification by States — would be completed as soon as possible, to be followed by its entry into force. In Argentina it had received legislative approval and was on course for ratification within the next few months.

13. The Statute's entry into force was, however, only one of many stages to be accomplished before the Court was fully operational. National courts would assume new responsibilities, for which new legislation would be needed. Thus his country's foreign affairs, justice and defence ministers had just set up a committee to consider the adaptation of Argentina's legislation to the Statute and to prepare the necessary draft legislation. The Court would not be able to carry out its functions unless national courts showed due cooperation. It was also important that the Committee's consideration over the coming weeks of other documents relevant to making the Court operational should stick to the letter and spirit of the Statute in order to maintain its integrity.

14. **Ms. Di Felice** (Venezuela) said that her Government, which had supported and actively participated in the establishment of the Court on the basis of its universality, complementarity and autonomy, had ratified the Rome Statute on 7 June 2000, thus demonstrating the significance it attached to the establishment of such a body and the priority it gave to making justice reliable and transparent both nationally and internationally.

15. The Preparatory Commission had achieved much and her delegation hoped that the rest of its mandate would be completed with equal success. Among its other tasks should be to agree on a definition of the crime of aggression; the other most serious international crimes had been given precise definition. Her delegation had therefore supported the creation of a working group to that end in 1999 and taken note of the various proposals made. An excellent basis was provided by the definition contained in General Assembly resolution 3314 (XXIX). Other proposals had merits but still lacked balance and the necessary safeguards against political interference in the Court's role. The integrity of the Rome Statute must be preserved, but universal participation in the Court was also essential. Only thus could it be fully effective. Her delegation was confident that the Court would shortly be operational.

16. **Mr. Akeju** (Nigeria) said that the adoption of the Rome Statute had sent a signal to those engaged in gross violations of human rights that the world would not stand idly by. Following that success, the Preparatory Commission had since adopted finalized draft texts for two important technical instruments, the Elements of Crimes and the Rules of Procedure and Evidence (PCNICC/2000/INF/3/Add.1-2). It remained for participants in the session to be held in November and December 2000 to ensure that the Commission's entire mandate was accomplished. His Government had signed the Statute on 1 June 2000 and was favourably disposed to ratifying it. Its legislative processes had been set in motion for that purpose. The International Criminal Court had received widespread support; if it was to be universally acceptable, however, its independence and impartiality needed to be guaranteed. In that connection, the principle of equitable geographical representation and the reflection of the principal legal systems of the world would be important criteria in appointing judges.

17. Lastly, although speculation as to the possible relationship between the Court and the existing ad hoc international criminal tribunals was premature, the international community could be certain that the Court would benefit from the copious literature already accumulated, especially in the area of precedents, and would emerge as an effective deterrent against the worst crimes affecting humanity.

18. **Mr. Balde** (Guinea) said that, despite the will expressed at the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court to prevent new murderous confrontations in the world, a deplorable indulgence was still being extended to the perpetrators of appalling crimes that had left over five million people dead over the past 10 years. The existing ad hoc international criminal tribunals, although of great importance, dealt with circumscribed areas. The International Criminal Court would be unable to play its full role, however, unless it enjoyed real independence and universality and could provide guarantees for victims and

witnesses. It should not be subjected to any political pressure. It should be complementary and subsidiary to national jurisdictions. His Government had signed the Rome Statute and would shortly proceed to ratification, in token of its determination to combat injustice and impunity. In that connection, his delegation would welcome the inclusion of the crime of aggression in the Court's competence. The adoption by the Preparatory Commission of the finalized draft text of the Elements of Crimes and Rules of Procedure and Evidence was commendable.

19. **Mr. Keinan** (Israel) said that, as one of the originators of the concept of an International Criminal Court, his delegation supported the Rome Statute; however, it remained deeply concerned at the inclusion, in the list of the gravest war crimes, of formulations tailored to meet the political agenda of certain States, while deviating greatly from the wording enshrined in the original instruments of international humanitarian law, on which they were based. Such an approach was an unfortunate reflection on the views of certain States on the Court's aims and functions. Similarly, the palliative interpretations adopted by the Preparatory Commission could not dispel the cloud of politicization surrounding what had been intended to be an impartial historical document, benefiting mankind as a whole. A political, public and academic debate concerning the Court and its importance in the context of international law and the international community was currently in progress in Israel, with a view to considering whether the Government would be able to sign the Statute before the end of 2000.

20. **Mr. Lacanilao** (Philippines) said that 21 States had so far ratified the Rome Statute and a large number of States had signed it. In June the Preparatory Commission had adopted by consensus the draft instruments on the Elements of Crimes and the Rules of Procedure and Evidence. Within a few weeks it would continue its work on the Relationship Agreement between the Court and the United Nations, the Court's Financial Regulations, the Agreement on Privileges and Immunities and the crime of aggression.

21. While his Government shared the noble objectives that had inspired the establishment of the Court, there were certain doubts and concerns as to how the Court would pursue its mandate. While the basic tenets of the Court were consistent with customary international law and due process, it was important that they should be applied effectively and without regard to politics and partisanship. The greatest pitfall for the Court would be to discharge its mandate unevenly.

22. Some delegations had alluded to the possible danger of political abuse of the Court by strong States in order to dominate weak ones. While safeguards were embodied in the Court's Statute and Rules, the fairness of its future functioning depended on the good faith of States parties to the treaty as well as the integrity of the judges and the prosecutor. Such good faith would be tested in the following weeks as the Preparatory Commission continued its debate on the definition of the crime of aggression. The issue was important for developing countries, many of which resented the use of force by strong States.

23. The Court should be free from political pressure. The Court and the prosecutor must resolve questions purely on legal grounds. They should not allow themselves to act as political instruments of any interest or sector. Nevertheless, politics had intruded into the discussion of the crime of aggression in the form of a proposal to insert the highly politicized processes of the Security Council into the Court's jurisdiction. The idea that the Security Council should have any role at all in the determination of the Court's jurisdiction stoked the fears of some that it would become a tool of political domination.

24. His Government would look closely at the results of the next session of the Preparatory Commission and would join the Rome Treaty only if it became convinced that the Court would be both effective and fair in the fulfilment of its mandate.

25. **Mr. Traoré** (Burkina Faso) said that at its forthcoming session, the Preparatory Commission would deal with, inter alia, the crime of aggression. His delegation wished to see a strict distinction made between the question of the crime of aggression and other matters that were more likely to be administrative in nature. It would be unacceptable for the question of the crime of aggression to be relegated to a position of lower priority, as aggression was the most serious crime against the international order, and significant elements of a definition existed already in custom and in the general principles of international law.

26. His delegation would distance itself from any position which in any way, tacitly or explicitly, challenged the integrity of the Rome Statute. It was

necessary to move forward, however, to ensure that the provisions adopted were fair and impartial. It would be neither responsible nor appropriate to equivocate with regard to those positions which sought to exclude certain nationals from the jurisdiction of the Court. The subordination of the Court to the Security Council should also be rejected firmly and unequivocally. It was unclear what would become of the principle of an independent judiciary if the Court came under the control of political authorities that could restrict its action.

27. His Government was fully committed to the establishment of the International Criminal Court. It had signed the Rome Statute and would ratify it in due course.

28. **Mr. Haj Ibrahim** (Syria) said that, on the basis of its compliance with international law, international humanitarian law and the Charter of the United Nations, his country supported international cooperation for the development of international law and its institutions and for the creation of important new legal institutions such as the International Criminal Court. Such a Court was essential in bringing to justice the perpetrators of acts of aggression, war crimes, crimes against humanity and genocide, which included those responsible for the Israeli massacres carried out in southern Lebanon and the Palestinian occupied territories, particularly during the previous 10 days, when over 100 defenceless young Palestinians had been brutally killed and vicious armed attacks had been mounted on Palestinian towns and villages.

29. He welcomed the Preparatory Commission's adoption of the finalized draft texts of the Rules of Procedure and Evidence and the Elements of Crimes, and hoped that similar tangible progress would be achieved in the forthcoming work on the crime of aggression so that more States would be encouraged to sign and ratify the important Rome Statute. He emphasized respect for the letter and spirit of the Statute, which should undergo no form of amendment and should take precedence in the event of any contradiction with texts subsequently elaborated by the Preparatory Commission. Equally, no concessions should be made to incorporate exceptions aimed at weakening the Court in order to satisfy those who rejected the Statute or who had difficulties with some of its articles and feared that their acts would be subject to the authority of the Court at some future stage. The Court would be pointless if only certain persons or nationalities were tried, since everyone was equal before the law without distinction or partiality.

30. With reference to the priority task of defining the crime of aggression, he believed that the definition contained in General Assembly resolution 3314 (XXIX) of 14 December 1974 served as a viable basis on which to build. He reaffirmed his view that any definition should cover all forms of aggression and that the crime should not be politicized. In that connection, he shared the opinion of the representative of the Islamic Republic of Iran that, while the mechanism should not deny the role of the Security Council, neither should it prevent perpetrators of the crime of aggression from being brought to account owing to the failure of the Security Council to act promptly or its inability to reach a decision in cases where the right of veto was used. Moreover, consideration should be given to conferring an appropriate role on the General Assembly in accordance with the Charter. His delegation was prepared to cooperate in a detailed examination of the elements of the crime of aggression and the role of the Security Council, in which context it had already played an active part in previous meetings and submitted various documents in regard to aggression.

31. In conclusion, he repeated his request to avoid the scheduling of simultaneous meetings with a view to enabling small delegations to attend every meeting, as well as to achieving wide attendance and transparency. He also emphasized the importance of ensuring the availability of interpretation services during informal consultations and supported the proposal that the Preparatory Commission should have two sessions, each of two weeks' duration, in 2001 for the consideration of outstanding matters. Furthermore, sufficient time should be allocated for both the formal and informal meetings of the Working Group on the Crime of Aggression.

32. **Mr. Lubinda** (Botswana) said that Botswana had signed and ratified the Rome Statute in September 2000, thereby reiterating its commitment to the Court and its deep desire to see criminals brought to justice, as well as its determination to ensure the elimination of criminal atrocities and the punishment of those who perpetrated such acts. In his view, the Rules of Procedure and Evidence and the Elements of Crimes guaranteed the rights of accused persons to a fair trial and also protected the rights of victims, particularly in regard to compensation and their participation in

relevant proceedings. He therefore applauded the efforts that had resulted in their codification, which, in his view, would assist in dispelling the fears and scepticism that had prevented some countries from taking positive steps to ratify and/or sign the Statute.

33. He fully endorsed the need for States to receive technical and financial support in their endeavours to harmonize their national criminal laws and procedures with the International Criminal Court and trusted that all remaining work would be carried out with the same enthusiasm and commitment hitherto displayed by the Preparatory Commission and the membership of the United Nations.

34. **Mr. El-Mssalloti** (Libyan Arab Jamahiriya) affirmed that his country had always avidly supported the establishment of an international criminal court to punish the perpetrators of crimes endangering international peace and security, such as genocide, terrorism, war crimes and crimes against humanity, to which end it had effectively participated in the work of the Preparatory Commission. Regrettably, however, the mechanism which had evolved as a result of those efforts did not apply the principle to which his own country adhered whereby the weak and the strong were subject to equal treatment. As such, the Rome Statute failed to meet the hopes and aspirations of all members of the international community, since political motives could produce a situation where one person was tried for a crime while another person having committed the same crime was not.

35. Consideration should therefore be given to the factors which had prompted many States, including his own, to refrain from ratifying and signing the Statute. The fact that the Security Council had the jurisdiction to refer crimes to the Court under Article VII of the Charter was a major shortcoming of the Statute in view of the bias that could intervene, as in the case of the Security Council resolutions under which his country had suffered for seven years and for which the motivations were more political than legal. As such, the ambitions of his own country and others for the creation of an effective and transparent international criminal system in which it was not simply a case of the strong accusing the weak had been disappointed.

36. His country would be unable to sign or ratify the Statute unless amendments were introduced in response to its concerns. Moreover, extremely serious crimes such as massacre, attacks on international forces, drug trafficking, the use or threat of use of nuclear weapons and all forms of terrorism, particularly State terrorism, were not included within the jurisdiction of the Court, which would also be unable to address the crime of aggression until a definition was agreed. Despite such failings, however, his country had participated effectively in the meetings of the Preparatory Commission and was making ongoing efforts to contribute to the successful outcome of its work. Such efforts, however, would be incomplete without an agreed definition of the crime of aggression, to which some States had thus far remained averse for purely political reasons.

37. **Mr. Akamatsu** (Japan) noted with satisfaction that 114 States had signed the Rome Statute and hoped that the number of ratifications would increase rapidly. He emphasized that without universal support, the Court would not be as effective or as credible as had been hoped, even if the Statute attained more than the minimum 60 ratifications.

38. At its next session, the Preparatory Commission would discuss the Relationship Agreement between the United Nations and the Court, the Agreement on Privileges and Immunities and the Financial Regulations of the Court. The last-mentioned were especially important, since without a proper financial basis the Court would be unable to carry out its work.

The meeting rose at 4.40 p.m.

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Summary record of the 13th meeting
Held at Headquarters, New York, on Friday, 20 October 2000, at 10 a.m.

Chairman: Mr. Politi ..... (Italy)

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Agenda item 162: Establishment of the International Criminal Court (*continued*)

Agenda item 155: Status of the Protocols Additional to the Geneva Conventions of 1949 and relating to the protection of victims of armed conflicts

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00-70076 (E)

The meeting was called to order at 10 a.m.

Agenda item 162: Establishment of the International Criminal Court (*continued*) (PCNICC/2000/L.1/Rev.1 and Add.1 and Add.2 and PCNICC/2000/L.3/Rev.1; PCNICC/2000/INF/3 and Add.1 and Add.2)

1. **Mr. Klisović** (Croatia) said that the adoption by consensus of the draft Rules of Procedure and Evidence and the draft Elements of Crimes demonstrated the international community's willingness to prevent flagrant violations of international humanitarian law. However, it was still necessary to adopt other instruments and to define the crime of aggression, which would enable the Court to intervene when States failed to do so. That would end the impunity of those who hid behind the principle of State sovereignty, since, under the Statute, the Court would have jurisdiction over war crimes and crimes against humanity irrespective of national boundaries. The integrity of the Statute was essential for the establishment of an independent and effective Court. In addition, the Statute provided for the granting of compensation to victims and persons who had been wrongfully detained, prosecuted or convicted, whereas the Statute of the International Tribunal for the Former Yugoslavia had ignored that issue.

2. Croatia, which was preparing to ratify the Statute, called upon States which had not yet signed or ratified the Statute to do so as soon as possible. In that connection, the modifications that would have to be made to national legislation should not constitute an insurmountable obstacle to signature and ratification.

3. **Mr. Enkhsaikhan** (Mongolia) said that the adoption, by consensus, of the draft Elements of Crimes and the draft Rules of Procedure and Evidence would not undermine the integrity of the Court's Statute or its future effectiveness, but would help ensure that the Court was independent and was not used to serve political interests. Agreement should be reached on the definition of the crime of aggression and other relevant documents, since that would promote the signature and ratification of the Statute and the process of putting the Court into operation. In that context, it was important to establish a trust fund to help States which lacked resources, such as Mongolia, to adopt the legislation necessary for the Statute's implementation.

4. **Ms. Kigenyi** (Uganda) said that the adoption of the draft Rules of Procedure and Evidence and the draft Elements of Crimes was important, but that it must be complemented by the adoption of other documents and the definition of the crime of aggression. In that connection, her delegation felt that the Security Council should determine whether an act of aggression had been committed, after which the Court, free from any political influence, would adjudicate on any individual criminal responsibility. It went without saying that the Court would only operate where national courts were either unable or unwilling to act.

5. The speed at which Governments were signing and ratifying the Statute was a clear sign that there was broad support for the Court. In Uganda, the process of ratifying the Statute was at an advanced stage.

6. **Mr. Mekprayoonthong** (Thailand) said that the Statute of the Court would provide a necessary complement to national courts to ensure that they could prosecute those responsible for serious crimes. In that connection, the Preparatory Commission had done important work on the definition of the crime of aggression and the adoption of the draft Elements of Crimes.

7. Thailand, which had signed the Statute in October 2000, had established a national committee to draw up implementing legislation for the Statute. That would enable it to ratify the Statute and to establish the bodies that would cooperate with the Court.

8. **Ms. Mekhemar** (Egypt) highlighted the importance of the Rules of Procedure and Evidence and the Elements of Crimes, which would be very useful for national courts in applying the Statute of the Court. However, in case of conflict, the Statute would prevail over those two instruments.

9. Egypt had always been in favour of establishing an international criminal court to punish those responsible for serious crimes. In that connection, the war crimes committed by the Israeli forces in the occupied territories demonstrated the need to establish the International Criminal Court. The Court should be independent and impartial and should not yield to political influences. For that purpose, the integrity of the Statute must be maintained. The Egyptian Government was examining the Statute with a view to signing it by the end of 2000.

10. The crime of aggression should be defined taking into account General Assembly resolution 3314 (XXIX) of 14 December 1974, which was based on the principles of customary international law.

11. **Mr. Chowdhury** (Bangladesh) said that he welcomed the inclusion of the Rome Statute as one of the 25 core international instruments to be signed and ratified on a priority basis. He agreed with the Canadian delegation that the establishment of a permanent international criminal court finally seemed to be within sight. In that regard, the adoption of the draft Rules of Procedure and Evidence and the draft Elements of Crimes represented a significant achievement. However, at its next session, the Preparatory Commission would have to consider the Relationship Agreement between the Court and the United Nations, the Agreement on Privileges and Immunities of the Court, proposals on the crime of aggression and on conditions for the exercise of the jurisdiction of the Court with regard to that crime and the rules of procedure of the Assembly of States Parties. He therefore supported the proposal of the Chairman of the Preparatory Commission that two more two-week sessions should be held in 2001 to enable the Commission to complete its mandate.

12. He congratulated all States Members of the United Nations that had signed and ratified the Statute. His country attached great importance to the early establishment of the Court because it had been a direct victim of genocide during the long liberation struggle in 1971, in which many enforced disappearances had occurred. He therefore urged the international community not to exclude that crime from the Court's jurisdiction.

13. Bangladesh had signed the Statute on 16 September 1999. The States Members of the United Nations would do well to avail themselves of the technical assistance offered by the Secretariat in understanding the core multilateral instruments, particularly the Rome Statute. Bangladesh had already begun the process of ratification, and thanked the delegations which had offered to share their experiences in that connection.

14. Lastly, he called upon some delegations to reconsider their position on the jurisdiction of the International Criminal Court with a view to giving the Court maximum authority.

15. **Mr. Erwa** (Sudan) said that his country attached great importance to the establishment of the International Criminal Court, and had signed the Rome Statute on 8 September, during the Millennium Summit. He thanked Norway for its generous assistance to the Sudanese working group which had made the preparations for its signing, in which the Minister for Foreign Affairs, the Minister of Justice and a number of magistrates and jurists had participated.

16. No international criminal court could exist without jurisdiction over the crime of aggression, since that would represent a setback for the application of international law. As for the relationship between the Court and the Security Council in the context of the determination and definition of the crime of aggression, they were two separate bodies which concerned themselves with different matters and they should maintain a flexible relationship to ensure a balance between their respective jurisdictions.

17. **Mr. Haque** (Pakistan) said that the establishment of the International Criminal Court was an effective deterrent. The principle of complementarity constituted the cornerstone of the exercise of jurisdiction by the Court.

18. His delegation hoped that the adoption of the Rules of Procedure and Evidence and Elements of Crimes would not jeopardize the integrity of the Statute or the sovereignty of States. It also hoped that, during the negotiations on the instruments supplementing the Statute at the forthcoming session of the Preparatory Commission, the concerns of all delegations would be taken into account so that universal participation in the affairs of the Court could be assured. As for the important and complex issue of aggression, he took note of the useful proposals submitted by various delegations and hoped that an acceptable definition of that crime could be reached.

19. **Mr. Powles** (New Zealand), speaking also on behalf of members of the Pacific Islands Forum — Australia, the Federated States of Micronesia, Fiji, the Marshall Islands, Nauru, Papua New Guinea, Samoa, the Solomon Islands and Vanuatu — said they welcomed the signing of the Rome Statute by 114 States and its ratification by 21 States, representing all regions of the world. He urged those States which had not done so to sign the Statute before the 31 December 2000 deadline. The members of the Pacific Islands Forum which had signed the Statute included Australia,

New Zealand, Samoa, the Solomon Islands, Fiji and the Marshall Islands; in addition, Fiji and New Zealand had ratified it on 29 November 1999 and 7 September 2000 respectively. The members of the Forum which had not signed or ratified the Statute were seriously studying their procedures and legislation in order to facilitate the process. The ratification process was well advanced in Australia and Samoa.

20. A special workshop on the International Criminal Court had been organized in conjunction with the annual meeting of the Pacific Island Law Officers (PILOM), currently taking place in Rarotonga (Cook Islands). Governments would have an opportunity to discuss important issues associated with the Court, including the signature and ratification of the Statute. He thanked the Government of Canada for its support for the workshop.

21. The adoption of the Rules of Procedure and Evidence and Elements of Crimes had led to an increase in the number of signatures and ratifications of the Statute. Currently, States must focus their efforts on the definition of the crime of aggression, the Financial Regulations and Rules, a relationship agreement, a privileges and immunities agreement and a headquarters agreement. The members of the Pacific Islands Forum were firmly committed to maintaining the integrity of the Statute and therefore considered that those documents must be elaborated in a manner that completely respected its letter and spirit. They supported the Bureau's recommendation that two sessions of two weeks' duration each should be held in 2001 in order to enable the Preparatory Commission to complete its mandate.

22. Speaking as the representative of New Zealand, he said that his country had ratified the Statute on 7 September 2000, at the Millennium Summit. It had fully implemented the Statute in its domestic law through the passage of the International Crimes and International Criminal Court Act 2000. In part to ensure that New Zealand would never become a safe haven for the perpetrators of those crimes, the Act gave the New Zealand courts universal jurisdiction over the crimes covered by the Statute and provided limited retroactive application for crimes of genocide and crimes against humanity. It also made provision for the possibility of persons sentenced by the Court serving their sentences in New Zealand prisons. He encouraged other delegations to give consideration to that issue in their ratification process, as it was important for a wide range of countries to offer that service.

23. In its instrument of ratification, New Zealand had included a declaration regarding some important matters of interpretation of the crimes covered by article 8 of the Statute. In particular, it would be inconsistent with principles of international humanitarian law to purport to limit the scope of article 8 to events involving conventional weapons only.

24. **Ms. Fritsche** (Liechtenstein) said that her country had been an early supporter of efforts to establish an international criminal court, based on its commitment to the fight against impunity, its belief in upholding the rule of law and the conviction that international law must play an enhanced role in the context of globalization.

25. It was encouraging that the Preparatory Commission had reached consensus on the Elements of Crimes and the Rules of Procedure and Evidence, and her delegation hoped that consensus would continue to be the guiding principle of its work. It was clear that no attempts should be made to change the content of the Rome Statute, although it might not live up to ideal standards.

26. The Millennium Declaration, adopted by an unprecedented number of Heads of State and Government, had brought about a significant increase in the number of signatures to the Statute, making the Court truly universal. Ratification was a complex process, and the 21 ratifications recorded thus far were an expression of the seriousness with which States approached it. Liechtenstein had begun the process and hoped to be among the first sixty States to ratify the Statute, probably during 2001.

27. **Mr. Krokhmal** (Ukraine) said that the 1998 adoption of the Rome Statute represented the most important development in the field of international law since the adoption of the Charter of the United Nations. It was a major building block of the future system of international security for the twenty-first century. The International Criminal Court was the only viable and universal mechanism to enforce compliance with and respect for international humanitarian law. A permanent Court was essential for the preservation, restoration and maintenance of international peace. The progress achieved by the Preparatory Commission would help to increase the pace of ratifications of the Rome Statute by States and the subsequent implementation of its

provisions in their national legislation, a process which required a series of legal, administrative and budgetary adjustments at the national level.

28. Ukraine, which had signed the Rome Statute at the beginning of 2000, strongly supported the integrity of the Statute. His country attached great importance to the definition of the crime of aggression, including the elements of the crime and the conditions under which the Court would exercise its jurisdiction.

29. He took note with satisfaction of the initiative of the Council of Europe regarding the exchange of information and views among Member and Observer States on the issues of implementation of the Rome Statute and cooperation with the Court.

30. **Mr. Rocha Aramburo** (Bolivia) said that his delegation associated itself with the statement made by Colombia on behalf of the Rio Group. The establishment of the International Criminal Court would ensure the promotion and protection of human rights and of international humanitarian law. The Preparatory Commission should continue to uphold the principles of universality, complementarity and independence when drafting the supplementary instruments. Concerning the crime of aggression, a categorical differentiation must be made between the act and the crime of aggression for purposes of determining individual criminal responsibility.

31. The Bolivian Chamber of Deputies had given preliminary approval to the Rome Statute; the Senate must consider its adoption and subsequent ratification. The integrity of the Statute must be preserved, in order to ensure the independence, credibility and authority of the Court and the principle of equality before the law.

32. **Ms. Kigenyi** (Uganda), speaking in exercise of the right of reply, said that the statements made against her country at the previous meeting (A/C.6/55/SR.11) were not new, and a response to them had already been made. The matter was being considered in another forum. Uganda remained committed to the implementation of the Lusaka Agreement and was prepared to offer to any interested delegation a detailed explanation of the progress her country had made in observing the Agreement.

33. **The Chairman** said that the Committee had concluded its discussion of agenda item 162.

Agenda item 155: Status of the Protocols Additional to the Geneva Conventions of 1949 and relating to the protection of victims of armed conflicts (A/55/173 and Corr.1 and Add.1)

34. **Mr. Štefánek** (Slovakia) said that his Government attached importance to international humanitarian law, which was based on the Geneva Conventions of 1949 and the two additional Protocols of 1977. The Rome Statute, as well as the draft elements of crimes adopted by the Preparatory Committee on 30 June 2000, confirmed the validity and relevance of the Geneva Conventions and their additional Protocols and the determination of the international community to put an end to impunity for the perpetrators of war crimes and crimes against humanity. The renewed interest in international humanitarian law had been reflected in the Millennium Declaration. Currently, the main challenges were to expand and strengthen the protection of civilian populations in conflict and emergency situations and to protect the most vulnerable, namely children, women and the elderly.

35. The implementation of the provisions of the Geneva Conventions and their additional Protocols was closely interrelated with the dissemination of norms of international humanitarian law. He highlighted in that regard the work done by the International Committee of the Red Cross.

36. Since the Geneva Conventions formed part of international customary law, the binding nature of the rules contained therein was not restricted only to the countries that were parties to the Conventions. However, he still welcomed the issuance of the Secretary-General's Bulletin on the observance by United Nations forces of international humanitarian law (ST/SGB/1999/13), which set out fundamental principles and rules of international humanitarian law applicable to United Nations forces conducting operations under United Nations command and control.

37. Slovakia was a party to the four Geneva Conventions of 1949, the two additional Protocols of 1977 and the major international legal instruments in the field of humanitarian law. It had signed the Rome Statute and was undertaking the necessary preparatory legal work for its ratification. On 5 June 2000, Slovakia had withdrawn all the reservations that had originally been made to the four Geneva Conventions by the former Czechoslovakia and retained by Slovakia

upon the declaration of succession of 2 April 1999. His Government was preparing, in cooperation with the Slovak Committee of the Red Cross, a comprehensive study on the incorporation of international humanitarian law into its domestic legislation. The Government was also considering the possibility of establishing a national body for the implementation of international humanitarian law.

38. **Mr. Tanzi** (Italy) said that he wished to confirm his country's full commitment to international humanitarian law as codified by the Geneva Conventions of 1949 and their additional Protocols of 1977. Italy had provided information to the Secretary-General on the domestic measures relevant to the implementation of those instruments, and it had made a declaration recognizing the competence of the International Fact-Finding Commission established under article 90 of additional Protocol I. It had also ratified the Rome Statute.

39. The International Criminal Court would have competence not only over grave breaches of the four Geneva Conventions but also over many serious violations of the two additional Protocols. That was a major achievement in international criminal law and in the fight against impunity.

40. The adoption of the instruments referred to contributed to the consolidation of the customary status of international humanitarian law. That built upon the authoritative statement by the International Court of Justice to the effect that the obligation to "respect" and "to ensure respect" for the Geneva Conventions "does not derive only from the Conventions themselves, but from the general principles of humanitarian law to which the Conventions merely give specific expression". (International Court of Justice, Reports of Judgements, Advisory Opinions and Orders, Case Concerning Military and Paramilitary Activities in and against Nicaragua, 1986, p. 114).

41. His delegation was fully aware of the importance of achieving universal ratification of treaties on international humanitarian law and therefore welcomed the efforts undertaken by the General Assembly and the International Committee of the Red Cross to that end. Particularly noteworthy was the Plan of Action adopted by the Twenty-seventh International Conference of the Red Cross and Red Crescent, which placed special emphasis on the importance of the ICRC Advisory Service in promoting the ratification of treaties on humanitarian law and in advising and assisting States parties in their implementation.

42. **Ms. Stancu** (Romania) said that her country had ratified the Geneva Conventions of 1949 and the additional Protocols of 1977, and had made the declaration provided for under article 90 of Protocol I with regard to the acceptance of the International Fact-Finding Commission. Moreover, Romania had signed the Rome Statute of the International Criminal Court and was a party to most of the treaties relating to international humanitarian law. Under the Romanian constitution, treaties ratified by Parliament were part of national law.

43. The Romanian Penal Code as well as the Law of National Defence and the Law on the Statute of Military Personnel contained provisions on the implementation of the norms of international humanitarian law and breaches thereof. The Penal Code contained provisions on crimes committed on the battlefield and on the legal responsibility of commanders and their subordinates.

44. In 1990, a Legal Affairs and International Humanitarian Law Office had been established under the army general staff. At the same time, a course on international humanitarian law had been included in the curricula of military academies. Legal affairs and humanitarian law offices had also been established within the high commands of the army, navy and air force.

45. All the foregoing demonstrated the great importance that Romania attached to the work concerning the dissemination and full implementation of international humanitarian law. During the Millennium Summit, Romania had signed the Optional Protocol to the Convention on the Rights of the Child.

46. **Mr. Gomaa** (Egypt) said that his delegation attached importance to the Protocols Additional to the Geneva Conventions of 1949, especially Protocol I, which established the bases for relations between the civilian population and the occupying Power. There had been unanimous universal recognition of the applicability of those instruments to the occupied Palestinian territories, including Jerusalem. In that regard, the brutal acts committed by the occupying Israeli authorities against innocent and unarmed civilians in their own territory constituted flagrant violations of international law, including international humanitarian law, especially the provisions of

Protocol I. His delegation wished to reaffirm the importance of the universal observance of the instruments of international humanitarian law, including the two Protocols of 1977. Expressing satisfaction with the number of countries that had ratified the Protocols, he urged the States that had not yet done so, to ratify them as soon as possible.

47. He welcomed the efforts of ICRC to ensure observance of the norms of international humanitarian law and said that the Prime Minister of Egypt had established a national committee composed of ministries and bodies responsible for the implementation of international humanitarian law as well as of relevant experts in the field. The first meeting of the Committee had taken place in the summer of 2000.

48. **Mr. Balde** (Guinea) said that Guinea had acceded to the major Geneva Conventions and their additional Protocols in 1984 as proof of its willingness to contribute to the protection and promotion of international humanitarian law and had made the declaration provided for under article 90 of Protocol I with regard to the acceptance of the International Fact-Finding Commission. Moreover, it had acceded to the 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict and its Second Protocol, and had signed and ratified the 1997 Ottawa Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-personnel Mines and on Their Destruction.

49. His delegation was seriously concerned by the proliferation of and trafficking in light weapons, especially in areas of conflict. In July 2000, a national committee had been set up to combat that phenomenon. In 1995 an act had been promulgated concerning the use and protection of the emblem and name of the Guinean Red Cross, an institution that worked tirelessly for the implementation of international humanitarian law in areas of conflict and in State agencies responsible for defence and security.

50. Guinea, which had over 800 kilometres of borders with countries in situations of armed conflict, had been offering asylum since 1989 to more than 800,000 refugees, representing some 10 per cent of its total population, and making it the country that had accepted the highest number of refugees in proportion to its population. However, the refugees included former rebels who were members of warring factions trafficking in light weapons, thus endangering his country's stability and security in both the border areas and in the interior. Moreover, since 1 September 2000, Guinea had been the victim of a series of vicious attacks perpetrated by hordes of rebels that had resulted in the deaths of many innocent civilians and considerable damage to property in the border areas in the south of the country. Despite that painful situation, his country would continue to offer hospitality to refugees because of African solidarity and it would continue to respect their rights, provided they obeyed the laws in force.

51. **Mr. Al-Kadhe** (Iraq) pointed out the importance of the Geneva Conventions of 1949 and the two additional Protocols of 1977, which provided the legal means to investigate violations of international humanitarian law, and recalled that the norms they prescribed were universally binding. The Protocols laid down the legal rules governing the methods and means of warfare and the treatment of civilians during armed conflicts, as also the protection of the civilian installations and economic resources of the countries in conflict.

52. For the past ten years, Iraq had been subjected to an unjust economic embargo, following military operations during which traditional weapons had not been employed, and the provisions of international humanitarian law were therefore applicable to it. The United States of America was using hunger and the blockade to achieve selfish and petty political objectives; the result was the genocide and the coercion to which the Iraqi people were continually subjected. That represented a flagrant violation of Protocol I of 1997, which prohibited the use of starvation for political or military ends. Consequently, Iraq was asking the Committee to condemn those violations as contrary to international humanitarian law and international law in general. The situation once again confirmed that the international community did not need new legal norms but needed only to observe and ensure the observance of the Geneva Conventions and the two additional Protocols.

53. Iraq fully supported the efforts of the ICRC to organize international conferences and meetings seeking ways of having States observe and ensure the observance of international humanitarian law. Despite its efforts, the past few days had seen new violations of the provisions of the Geneva Conventions and the additional Protocols by the Israeli occupying authority,

which turned a deaf ear to all the appeals of the community of nations that international law should be respected. The international community must promote the establishment of a practical legal mechanism that would further the observance of international humanitarian law and safeguard its principles.

54. **Mr. Tarabrin** (Russian Federation) expressed satisfaction at the increase in the number of countries that had signed the Protocols to the Geneva Conventions of 1949 and recalled that the adoption of the Conventions had been a milestone in the history of international humanitarian law, whose foundations had been laid 100 years earlier, on Russia's initiative, at the first International Peace Conference held at The Hague. On the occasion of the centennial of that Conference, the Russian Federation had taken various steps towards ratifying the instruments of international humanitarian law.

55. Despite the efforts of the international community to prevent armed conflicts and reduce their impact on civilian populations to a minimum, conflicts continued to cause the loss of thousands of lives, primarily of civilians, among them the humanitarian assistance personnel of the United Nations, the ICRC and other organizations. His Government had adopted laws proscribing cruel treatment of civilian populations and prisoners of war and it strictly prohibited the recruitment, training and financing of mercenaries. In addition, Russian penal law prescribed serious penalties for the massive destruction of flora and fauna and the contamination of the atmosphere or the water resources that directly impinged on the civilian population.

56. Strict compliance with the standards of international humanitarian law must be ensured and their implementation must be improved and monitored. Although the chief responsibility lay with Governments and the parties to armed conflicts, the international community itself could further that objective. It had to take new initiatives to protect the victims of armed conflicts and to circumscribe the limits of the permissible in warfare. In that connection, the Russian Federation supported the recent Security Council efforts to give greater protection during armed conflicts to certain groups within the civilian population, especially children and international personnel. The relevant Security Council resolutions sounded a warning to those who committed actions contrary to international humanitarian law.

57. It was alarming to ascertain that not all States were fully complying with their obligations under the Geneva Conventions of 1949 and the additional Protocols. The ICRC was doing valuable work in promoting those international instruments. All the obligations arising from them must be strictly observed, and those States which had not yet done so must once again be urged to ratify them.

58. **Mr. Krokhmal** (Ukraine) said that his Government had ratified the two Protocols to the Geneva Conventions of 1949, relating to the protection of victims of armed conflicts. The Ukraine had also recognized the competence of the International Fact-Finding Commission. His Government had set up an interdepartmental commission to ensure Ukraine's full compliance with the provisions of international treaties in the field of humanitarian law and, in particular, with the Geneva Conventions and the additional Protocols.

59. The fact that most contemporary wars were civil or inter-ethnic conflicts whose main purpose was not to subdue the adversary but to exterminate it had resulted in making civilians the direct target of such attacks. Such a situation underscored the importance of full compliance by all parties to a conflict with the Geneva Conventions and the additional Protocols, and it should be recalled that, under Protocol I, grave breaches of the Conventions and the Protocols should be regarded as war crimes. Furthermore, compliance with the provisions of Security Council resolution 1296 (2000) was essential for the protection of civilians in armed conflict.

60. **Mr. Al-Dailmi** (Yemen) said it was deplorable that not a day went by without conflicts and crises in which the principles of international humanitarian law were being flouted. Perhaps the cruellest violations were those lately perpetrated in the occupied Palestinian territories, whose inhabitants were being harassed and expelled from their lands. It must be asked in that connection why, as Israel pursued its settlement policy and its judaization of Jerusalem, the Security Council resolutions on Palestine had not been implemented.

61. He urged States to recognize the competence of the International Fact-Finding Commission established under Protocol I, praised the efforts of the International Red Cross and Red Crescent Movement to alleviate the suffering of the civilian victims of foreign occupation and armed conflicts, and endorsed the recommendations

and decisions adopted by the Movement at its Twenty-seventh International Conference.

62. **Mr. Obeid** (Syrian Arab Republic) said that the aim of the Geneva Conventions and the additional Protocols was to prevent breaches of international law and protect civilian populations in time of war. Specifically, Protocol I was directly applicable to the situation in the occupied Arab territories and especially to the city of Jerusalem. In recent days, the killings perpetrated by Israel in the occupied Palestinian territories had increased. Israel had become an outlaw State, which daily violated international humanitarian law, the Geneva Conventions and the additional Protocols and the Charter of the United Nations and its resolutions. Furthermore, Israel was refusing to allow the appointment of a mission to investigate such crimes, for it did not want the international community to have any information on them. Nevertheless, now more than ever, the international community must ensure the implementation of the instruments of international humanitarian law and hasten to set up the International Criminal Court, under whose jurisdiction such crimes would fall.

63. The Red Cross and Red Crescent Movement should be thanked for the enormous amount of work it had done in the occupied Arab territories of the Syrian Golan, southern Lebanon and Palestine, and for the work it was doing generally to promote knowledge of the precepts of international law and protection of civilians.

64. **Mr. Witschel** (Germany) said that the increasing acceptance of and compliance with the instruments of humanitarian law were of the utmost importance. Despite the impressive number of States which had become parties to the Geneva Conventions and the additional Protocols thereto, much remained to be done. As a State party to the four Geneva Conventions and the two additional Protocols thereto, which had accepted the competence of the International Fact-Finding Commission established under article 90 of Protocol I, Germany welcomed the initiative of the International Red Cross and Red Crescent Movement for the adoption of a third additional protocol concerning the important issue of the use of emblems. He thanked the Government of Switzerland for its important and constructive contribution in that regard.

65. Germany had signed the Rome Statute and was about to complete the ratification process. On 17 May 1999, it had signed the Second Protocol to the 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict, and, in September, the Optional Protocol to the Convention on the Rights of the Child related to the involvement of children in armed conflict. It called on all States to sign and ratify those instruments.

66. Germany had participated actively in the Twenty-seventh International Conference of the Red Cross and Red Crescent, held in Geneva in October and November 1999, and endorsed the plan of action adopted at that Conference.

67. Lastly, he was convinced that a forum must be created in the General Assembly or in the Sixth Committee for the regular review of the status of the instruments relating to international humanitarian law.

68. **Mr. Troncoso** (Chile) referred to an issue which he believed was crucial to full compliance with the 1949 Geneva Conventions and the additional Protocols thereto, and to the effective implementation of the Rome Statute in the domestic law of States, with a view, in the latter case, to giving full effect to the principle of complementarity. Conduct that was criminalized at the international level should be characterized by domestic criminal law, and a sentence commensurate with its seriousness should be prescribed. The idea was thus not to introduce the crime contemplated in the treaty into criminal law in the same terms but rather to characterize and punish it in accordance with the actual principles of criminal law.

69. For all those reasons, his delegation attached great importance to stepping up the exchange of information and experiences among States, in order to understand how the processes of applying those international instruments had been executed.

70. **Mr. Al-Swady** (United Arab Emirates) said that, despite the consensus and unanimity within the international community on the 1949 Geneva Conventions and the two 1977 additional Protocols thereto, they remained largely unimplemented; not only did millions of innocent civilians fall victim to all types of atrocities, but also efforts to provide them with food and medical assistance were hampered.

71. Although on numerous occasions, the Security Council and the General Assembly had reiterated that the 1949 Geneva Conventions and the 1977 additional

Protocols thereto applied to the territories occupied by Israel, to Jerusalem and to Israel itself, Israel had continued to build illegal settlements, mistreating the inhabitants of the occupied territories and destroying places of worship. The events of the past three weeks were a shameful and horrible case of deliberate genocide, with more than 100 deaths and thousands of injuries, and the blind destruction of Palestinian infrastructures. Israel was attempting to wipe out the Palestinian people and to affirm its occupation of the territories by presenting the international community with a fait accompli. If Israel was not compelled to respect the 1949 Geneva Conventions and the 1977 additional Protocols thereto, the credibility of those instruments would have to be called into question.

72. **Ms. Telalian** (Greece) said that the existing rules of international humanitarian law must be strengthened and the provisions of the 1949 Geneva Protocols and the two 1977 additional Protocols thereto should be strictly implemented. States must disseminate those rules at the national level, particularly among their armed forces. Greece had incorporated the Conventions into its national legal system and attached great importance to the monitoring mechanisms established, in particular, the International Fact-Finding Commission.

73. The adoption of the Rome Statute would contribute to the consolidation of international humanitarian law and to the prevention of serious crimes. Greece was in the process of ratifying the Statute and the Second Protocol to the Convention for the Protection of Cultural Property in the Event of Armed Conflict. Ratification of those instruments, like the Optional Protocol to the Convention on the Rights of the Child related to the involvement of children in armed conflict, would help to increase respect for the values of international humanitarian law.

74. Lastly, she commended the efforts of the International Committee of the Red Cross (ICRC) to disseminate, promote and implement international humanitarian law.

75. **Mr. Zellweger** (Observer for Switzerland) said that, as the depositary of the Geneva Conventions and the additional Protocols thereto, Switzerland periodically urged States that were not parties to accede to those instruments. On 14 August 2000, Eritrea had acceded to the Geneva Conventions, bringing the number of States parties to those instruments to 189. The number of States parties to Protocol I was 157, while there were 150 States parties to Protocol II.

76. Although the Charter of the United Nations clearly established that the threat or use of force was illegal, armed conflicts continued to arouse concern; even more worrying was the lack of respect for international norms limiting their destructive effects. Switzerland therefore hoped that, in future, the additional Protocols would enjoy the same universality as the Conventions.

77. One of the fundamental goals in establishing the Red Cross had been to protect health workers of the armed forces tending to the wounded on the battlefield on an impartial basis. To that end, in 1864, the protective symbol — a red cross on a white background — had been adopted; more than 130 years later, the value of the emblem was being undermined because it was being abused and some national societies had problems accepting it, which created real difficulties for the International Red Cross and Red Crescent Movement, whose purpose was to bring about universality and unity. By a resolution of the 1999 Twenty-seventh International Conference of the Red Cross and Red Crescent, a decision had been taken to establish a joint working group to study the question. Switzerland, as depositary of the Geneva Conventions, had been invited by the President of ICRC to consider convening a diplomatic conference in order to resolve the question of emblems through the adoption of a third additional protocol.

78. On 13 September 2000, Switzerland had decided to convene such a diplomatic conference, since it had noted that there was a large consensus among States parties on the matter. Nonetheless, intense consultations held by Switzerland had shown that, owing to the recent events in the Middle East, the necessary conditions for the consensus did not exist and it had therefore been decided that the diplomatic conference would be postponed until early 2001. However, in order to ensure that the process was not interrupted, his country, as depositary, would continue holding consultations with States parties on the basis of a new draft additional protocol prepared by ICRC in cooperation with the International Federation of Red Cross and Red Crescent Societies.

79. **Mr. Helle** (Observer for the International Committee of the Red Cross) said that universal accession to the basic instruments of international

humanitarian law remained an essential precondition for compliance with it. The Geneva Conventions had already attained such universality, since 189 States were currently parties to them. In order to improve legal protection of the civilian population against the effects of hostilities, it was essential that the 1977 additional Protocols attained the same degree of universality. ICRC called on all States which had not done so to ratify the additional Protocols as soon as possible.

80. ICRC attached great importance to the International Criminal Court, whose aim was to ensure effective punishment of those who committed the most serious crimes, regardless of whether they were committed during international or internal conflict.

81. ICRC welcomed the report of the Secretary-General (A/55/173 and Add.1 and Corr.1) and hoped that as many States as possible would supply information regarding the implementation of international humanitarian law by their national authorities.

82. Now that the United Nations Decade of International Law had come to an end, it was essential to establish some type of forum in order to continue the debate on humanitarian law. To that end, the current agenda item could be expanded to include other instruments of humanitarian law, such as the 1949 Geneva Conventions, the Convention for the Protection of Cultural Property in the Event of Armed Conflict (The Hague, 1954) and its two Protocols of 1954 and 1999, and the 1998 Rome Statute of the International Criminal Court. Furthermore, since the protection of victims of armed conflict was a matter of ongoing concern for the international community, the topic should be considered annually.

83. In order to protect the victims of war, it was necessary in times of peace to take measures at the national level to ensure the implementation of humanitarian law, and in particular to enact national legislation to repress serious violations of humanitarian law, to establish regulations governing the use of the protected emblems and measures for the punishment of their misuse, and to protect cultural property. The States parties were also under an obligation to promote knowledge of the Geneva Conventions and their additional Protocols among the population, especially among the armed forces.

84. ICRC welcomed the pledges made by States at the 27th International Conference of the Red Cross and Red Crescent to ratify the instruments of humanitarian law and to take measures to implement that law at the national level, and hoped that those pledges would be translated into concrete action. In that respect, ICRC was willing to provide any assistance that might be needed in achieving those objectives.

85. He drew attention to the meeting of experts on the national implementation of the rules for the protection of cultural property during armed conflict, organized by the ICRC Advisory Service on International Humanitarian Law, with the participation of UNESCO, which had taken place in Geneva on 5 and 6 October 2000. The discussions at that meeting would form the basis for drafting guidelines for the national implementation of the 1954 Hague Convention and its two Protocols.

86. ICRC congratulated the 61 States which had established national commissions to advise and aid Governments in implementing and disseminating humanitarian law, and reiterated its willingness to provide legal advice and technical assistance in that respect.

87. Lastly, he referred to a major project on customary humanitarian law in which ICRC had been engaged since 1996. The study was based on the practice of a large number of States and was quite unique in its field; the results of the study should be available in autumn 2001.

88. **Ms. Hammam** (Observer for the World Food Programme (WFP)) said that hundreds of thousands of innocent people around the world were suffering the consequences of conflicts, and humanitarian staff seeking to assist them were themselves targets of violent attacks. The recent tragedies in West Timor and Guinea were further testimony of the dangerous conditions which humanitarian workers of the United Nations and other organizations were facing.

89. A growing factor in that situation had been the resurgence of the use of hunger as a weapon in war, as demonstrated in Angola, Somalia and southern Sudan.

90. WFP welcomed the intensified efforts made by the Security Council over the past year to raise awareness of the need to protect civilians and United Nations personnel in situations of armed conflict. It was increasingly recognized that the reason for the

failure of efforts to protect vulnerable populations was more often a lack of political will than a shortage of conventions and protocols.

91. WFP was particularly committed to protecting women and children, who were the first victims of violence, securing humanitarian access in cooperation with Governments, the United Nations Emergency Relief Coordinator, the appropriate United Nations entities and other actors, promoting different approaches, for example Days of Tranquillity for children which could help in negotiating access to affected civilian populations, and protecting humanitarian workers.

92. She appealed to the international community to adopt concrete measures to ensure the safety of humanitarian workers and punish those responsible for attacks against them, and urged States to ratify the Rome Statute and other instruments relating to the protection of civilians and international staff.

93. **The Chairman** said that the Committee had completed its consideration of agenda item 155.

The meeting rose at 1.15 p.m.

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Chairman: Mr. Politi ..... (Italy)

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Agenda item 159: Report of the International Law Commission on the work of its fifty-second session

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00-70270 (E)

The meeting was called to order at 10.10 a.m.

Agenda item 159: Report of the International Law Commission on the work of its fifty-second session (A/55/10)

1. **The Chairman**, acknowledging the exceptional contribution made by the Commission to the development and codification of international law, said that its recent session had been very productive and had made substantial progress on a number of topics. He was suggesting a thematic approach for the consideration of its report (A/55/10), beginning with the topic of State responsibility in chapter IV. The Committee would then take up chapters V and VI, on diplomatic protection and unilateral acts of States, and consider finally chapters VII, VIII and IX, dealing with reservations to treaties, international liability for injurious consequences arising out of acts not prohibited by international law (prevention of transboundary damage from hazardous activities) and other decisions and conclusions of the Commission.

2. **Mr. Yamada** (Chairman of the International Law Commission) said that the purpose of the first three chapters was to describe the membership and internal organization of the Commission, provide a brief summary of the Commission's work at its fifty-second session and, at the request of the Sixth Committee, to highlight the questions relating to substantive chapters of the report on which the views of Governments were particularly helpful to the Commission. He would begin his introduction of the report with the first substantive chapter, which was chapter IV on the topic of State responsibility.

3. The Commission had debated the third report of the Special Rapporteur on State responsibility. Its discussions were reflected in paragraphs 47 to 405 of its report, but were superseded to some extent by the work of the Drafting Committee, which had taken account of the views expressed in plenary session. The Drafting Committee had provisionally adopted on second reading the draft articles contained in the appendix to chapter IV. The Commission had decided to request comments by Governments on the draft articles, although they had not yet been finally adopted by the Commission and were not yet accompanied by a revised commentary.

4. In so deciding, it was departing from its usual practice because of the unusual circumstances relating to its work on State responsibility, which had now been in progress since 1955. Its provisional adoption of the draft articles on first reading had taken place over two decades, from 1973 to 1996. Because of the significant developments since that time in the law of State responsibility, however, it would be useful at the present stage to receive comments by Governments, either in the context of the debate in the Committee or preferably in writing, on the complete text of the draft articles provisionally adopted by the Drafting Committee, and especially on any aspect which required further consideration before the second reading was completed in 2001. For that purpose, the report of the Drafting Committee (A/CN.4/SR.2662), containing the entire draft articles and an introductory statement by the Chairman of that Committee, had been transmitted to Governments on 21 August 2000. Written comments should be submitted to the secretariat by 31 January 2001.

5. The 59 draft articles were divided into four parts. Part One, entitled "The internationally wrongful act of a State" contained articles 1 to 27 relating to the relevant general principles, the act of the State under international law, the breach of an international obligation, the responsibility of a State in relation to the act of another State, and the circumstances which might preclude the wrongfulness of an act. Part Two, adopted on first reading, had been divided into two parts. That had been done in order to separate the provisions dealing with the content of responsibility from those bearing on the invocation of responsibility, on the basis that secondary consequences might arise by operation of law from the commission of an internationally wrongful act, and there were ways in which such consequences might be mitigated. The first part of Part Two, entitled "Content of international responsibility of a State", contained draft articles 28 to 42, addressing the relevant general principles, the various forms of reparation, and serious breaches of international obligations to the international community. Part Two bis was entitled "The implementation of State responsibility". It contained draft articles 43 to 49, addressing the procedural and substantive aspects of the invocation of State responsibility, and draft articles 50 to 55, on the conditions and limitations relating to countermeasures. The general provisions concerning lex specialis and the various "without prejudice" clauses were contained in

articles 56 to 59 of a new Part Four, entitled "General Provisions".

6. Part Two dealt with five major issues: the general principles relating to the notion of injury and the necessary causal link; satisfaction and interest in relation to the various forms of reparation; the content and consequences of serious breaches of essential obligations towards the international community as a whole; the definition of the injured State for the purposes of the draft articles; and the conditions and limitations relating to countermeasures.

7. Since there was no agreement as to the distinction between "injury" and "damage", the Drafting Committee had decided, in article 31 [42], paragraph 2, to encompass in the definition types of injury which gave rise to obligations of restitution and compensation, together with those which might entail an obligation of satisfaction. The same paragraph dealt with the necessary causal link between the internationally wrongful act and the injury by referring to "[injury] ... arising in consequence of the internationally wrongful act of a State". The Drafting Committee had decided that it would not be prudent to insert an adjective qualifying the nature of the causal link, since the requirement to specify a causal link was usually addressed in the primary rules, and would not be the same for every breach of an international obligation.

8. The formulation of article 38 [45], on satisfaction, was based on the understanding that it was not a common form of reparation and would not be needed if injury caused by an internationally wrongful act of a State could be fully repaired by restitution or compensation. Satisfaction, granted for injury which could not be assessed in financial terms and which was an affront to the State, was an exceptional remedy and frequently symbolic in character. The words "another appropriate modality" in paragraph 2 emphasized the non-exhaustive character of the modalities of satisfaction listed, and the possible relevance of the breach in determining the appropriate form of satisfaction. The limitation on satisfaction set in paragraph 3 was intended to avoid unreasonable demands for satisfaction which were incompatible with the sovereign equality of States.

9. Article 39, on interest, had been inserted in the draft in response to suggestions by a number of Governments. Interest might be required in certain cases in order to ensure full reparation. The payment of interest could not be combined with lost profits if that would result in a double recovery for the injured State.

10. Chapter III of Part Two dealt with the content and consequences of serious breaches of essential obligations to the international community as a whole. The Drafting Committee had decided to delete the reference to "international crimes" which had featured on first reading and which had proved controversial both in the Commission and among Governments. There had been no agreement as to whether it was justified to draw a distinction between two types of breaches of international obligations. Article 41 laid down three conditions applying to such breaches, and paragraph 2 defined a "serious" breach as one involving a gross or systematic failure by the responsible State to fulfil its obligation. The breach must also entail the risk of substantial harm to the fundamental interests of the international community as a whole. Article 42 [51, 53] addressed the consequences of such serious breaches. Paragraph 1 left open the question whether damages reflecting the gravity of the breach were additional to those owed by the responsible State under article 37 [44]. The cooperation required of other States, in paragraph 2 (c), to bring the breach to an end was qualified by the phrase "as far as possible", in order to take into account circumstances such as legal obligations binding upon some States under the law of neutrality which might prevent them from cooperating.

11. Turning to the notion of an injured State, addressed in article 43 [40] and in article 49, paragraph 1, he explained that the definition contained in the first-reading text had been too broad and partly inconsistent. It would have allowed many States to claim to be injured and therefore entitled to claim the full range of remedies available under the articles. The identification of an injured State in any particular case depended to some extent on the primary rules and the circumstances of the case. In the context of the secondary rules, it was useful to distinguish between the broader category of States, those which were entitled to invoke responsibility, and the narrower category of States entitled to claim specific remedies. The Drafting Committee had decided to dispense with the term "State having a legal interest", and to replace the term "obligations erga omnes" by "obligations towards the international community as a whole". Subparagraph (a) concerned the breach of an obligation

in a bilateral relationship, for example under a bilateral treaty or a multilateral treaty creating a bundle of bilateral relations. Subparagraph (b) addressed obligations owed to a number of States or to the international community as a whole. The word "specially" emphasized the adverse effect of the wrongful act on the injured State, setting it apart from all other States affected. The same subparagraph dealt with the obligations in a multilateral relationship which were called "integral" obligations, because the breach of one of them would affect the enjoyment of the rights or performance of the obligations of all States belonging to the group in question. Article 43, subparagraph (b) (i), and article 49, paragraph 1, both referred to a wrongful act which affected different categories of States in a different way. Article 43 dealt with an injured State in its individual capacity, whereas article 49, paragraph 1, dealt with a State affected in its capacity either as a member of a group of States to which the obligation was owed, or as a member of the international community.

12. The fifth of the major issues he had mentioned, that of countermeasures, was addressed in article 23 [30] of Part One as well as in chapter II of Part Two bis. According to article 23, acts taken as countermeasures were wrongful per se, unless they were justified only in relation to the responsible State, and did not target third States. An act directed against a third State would not fall within the definition of a countermeasure and could not be justified as such. Secondly, countermeasures could be taken only under the conditions set out in articles 50 [47] to 55 [48].

13. Chapter II of Part Two bis dealt with the limited purpose of countermeasures and the conditions under which they could be taken, as well as with the limitations applying to them. The articles adopted on first reading were controversial in that they would have indirectly submitted disputes relating to State responsibility to compulsory settlement when countermeasures were taken. The Drafting Committee had therefore designed an operational system secured by conditions and limitations that were intended to maintain countermeasures within generally acceptable bounds.

14. Article 50 [47] defined the limited purpose of countermeasures and operated as a condition of article 23 [30]. Paragraph 1 limited the purpose of countermeasures to inducing the State responsible for an internationally wrongful act to comply with its obligations under Part Two. Consequently, countermeasures would not have a punitive purpose. It also set out the first condition for taking countermeasures, which was the failure of the responsible State to comply with its obligations under Part Two. Paragraph 2 indicated the temporary nature and the bilateral character of countermeasures by limiting them to the "suspension of performance" of one or more international obligations of the injured State "towards" the responsible State. Paragraph 3 addressed the reversibility of countermeasures by providing that, during its suspension of a treaty, a State must not take any action that would preclude the re-entry into force of such treaty. Countermeasures, however, could cause irreversible collateral damage without preventing the resumed compliance with the underlying obligation. The phrase "as far as possible" in paragraph 3 indicated that if the injured State had a choice between a number of lawful and effective countermeasures, it should select those which did not prevent the resumption of performance of the "obligations in question".

15. Article 51 [50] concerned obligations which were not subject to countermeasures. Paragraph 1 provided that countermeasures could not involve any derogation from the obligations listed in the article. Subparagraph (a) dealt with the prohibition of the use of force as embodied in the Charter of the United Nations. The wording concerned forcible countermeasures, while economic and political coercion was addressed by other provisions of the article, including subparagraph (b), which indicated that countermeasures should essentially remain a matter between the injured and the responsible States and have only minimal effects on private individuals by providing that "fundamental human rights" should remain inviolable.

16. Subparagraph (c) dealt with the obligations of humanitarian law with regard to reprisals and subparagraph (d) dealt with peremptory norms of general international law. Lastly, subparagraph (e) dealt with the inviolability of diplomatic or consular agents, premises, archives and documents, which was essential to the normal functioning of international relations. Paragraph 2 of the article dealt with applicable dispute settlement procedures in force between the parties and underlined the importance of compliance with those procedures when countermeasures were taken. Moreover, it implied that dispute settlement

mechanisms could not themselves be the subject of countermeasures.

17. Article 52 [49] addressed the principle of proportionality, which the text adopted on first reading had related to the gravity of the wrongful act and the injury suffered. Given that the purpose of countermeasures was to induce performance, the revised text related proportionality primarily to the injury suffered, while "taking into account" the two additional criteria of the gravity of the wrongful act and the rights in question. By implication, the latter meant the rights of both the injured State and the responsible State. Furthermore, the rights of other States, which might also be affected, could also be included under that wording. The words "taking into account" were not exhaustive; depending on the particular context of each case, other factors might also be relevant in determining proportionality.

18. In drafting article 53 [48] on conditions relating to resort to countermeasures, the Drafting Committee had taken into account the criticisms made of article 48 adopted on first reading because it had linked countermeasures to compulsory dispute settlement procedures. Paragraph 1 addressed the notification requirement and paragraph 2 required that, once the injured State had decided to take countermeasures, it should notify the responsible State and also "offer" to negotiate with it. Paragraph 3 dealt with the interim measures of protection referred to in the text adopted on first reading, now reworded to read "provisional and urgent countermeasures". Such countermeasures were not subject to the requirements of paragraph 2, but had to comply with the requirement of the notification of the injured State's claim under paragraph 1 and were subject to the same limitations as countermeasures. Paragraph 4 was intended to discourage countermeasures while the parties were negotiating in good faith, but did not apply to countermeasures under paragraph 3. Hence, the injured State was not barred from taking provisional and urgent countermeasures, even during negotiations.

19. Paragraph 5 dealt with the case in which the wrongful act had ceased and the dispute was submitted to a court or tribunal with the authority to make decisions binding on the parties. Once those conditions had been met, the injured State could not take countermeasures, or, if it had already done so, it was required to suspend them within a reasonable period of time. The paragraph assumed that the court or tribunal concerned had jurisdiction over the dispute and also the power to order provisional measures. Lastly, paragraph 6 was a general provision relating to the good faith obligation to comply with dispute settlement procedures agreed between the parties themselves.

20. New article 54 concerned the taking of countermeasures by States other than injured States that were entitled to invoke responsibility under article 49. When there was no injured State within the meaning of article 43 [40], it was necessary to make a distinction between breaches of obligations affecting several States or the international community as a whole, on the one hand, and serious breaches of obligations owed to the international community as a whole and essential for its protection as defined in article 41, on the other hand. Only with regard to the latter breaches could countermeasures by States that were not injured within the meaning of article 43 [40] be justified. With regard to the other breaches, countermeasures by a State entitled to invoke responsibility under article 49 could be taken only when there was an injured State.

21. The two above situations were addressed in paragraphs 1 and 2 of new article 54. When there was an injured State, any other State to which the obligation was owed could take countermeasures subject to certain conditions under paragraph 1; first, such countermeasures should be taken at the request and on behalf of the injured State; and secondly, that State should itself be entitled to take countermeasures. In the case of breaches within the scope of the definition of article 41, any State could take countermeasures in the interest of the beneficiaries of the obligation breached under paragraph 2, regardless of whether there was an injured State. The words "in the interest of the beneficiaries" were intended to include the interests of any injured State which would not have the same role as in paragraph 1, since the obligation breached concerned the fundamental interests of the international community as a whole. Lastly, paragraph 3 provided that States had a general obligation to cooperate when they took countermeasures with a view to ensuring that those measures, both individually and in their collective effect, complied with the conditions laid down in Chapter II of Part Two bis for taking countermeasures, including the requirement of proportionality.

22. Article 55 [48] concerned the termination of countermeasures and dealt with the situation in which

the responsible State had complied with its obligations under Part Two, as a result of which there was no ground for maintaining countermeasures which should be terminated.

23. Concluding the first part of his statement on the report of the International Law Commission (A/55/10), he re-emphasized the importance of comments by Governments on the draft articles on State responsibility appended to Chapter IV insofar as they would enable the Commission to reflect such views when it finalized the text at its next session.

24. **Mr. Hoffman** (South Africa), speaking on behalf of the South African Development Community (SADC), welcomed the attention devoted by the Commission to the draft articles on State responsibility, which had now been on its agenda for 40 years. While there was no place for countermeasures in an advanced system of law, they were a matter of considerable concern and even a necessary evil in the absence of a central law enforcement agency. As such, articles 50 to 55 were rightly concerned with the imposition of limits on countermeasures, and he welcomed the qualifications contained in those articles, as a result of which countermeasures would be marginalized and resorted to in exceptional cases only.

25. Former article 19, which distinguished between international crimes and delicts, had always been a source of controversy. Articles 41, 42 and 54 were the resulting compromise, avoiding as they did the use of the controversial term "crime", while still recognizing that certain particularly serious wrongful acts might give rise to a community response. Consequently, a serious breach of obligation exposed the responsible State to damages reflecting the gravity of the breach. Other States, however, were obliged not to recognize the lawfulness of any situation created by the breach and to cooperate in bringing the breach to an end. Moreover, any State could take countermeasures in the interest of the beneficiaries of the obligation breached.

26. He appreciated that the decision to include a section on the settlement of disputes was dependent on the eventual form of the draft articles. The inclusion of such a section would be necessary if they took the form of a convention, which would not be the case if a restatement was contemplated. He therefore urged the Commission to give serious consideration to that question at its next session, during which he hoped that the project would be completed with a view to avoiding any further delay following the inevitable changes in the composition of the Commission after its election in 2001.

27. **Mr. Wood** (United Kingdom), concerned by the lack of contributions to enable young lawyers to attend the International Law Seminar, urged Governments to follow his own Government's example of covering such a fellowship with a view to heightening awareness of, and enthusiasm for, the practice of international law. As for the Commission's long-term programme of work, he saw particular merit in the proposed new topics in view of the potential need for clarification of the law in areas in which practical problems could arise, such as responsibility of international organizations and effects of armed conflicts on treaties. As for the final proposed topic of risks ensuing from fragmentation of international law, however, he wondered whether the points already discussed about the actual and potential conflicts stemming from the diversity of legal regimes and structures governing a particular situation lent themselves more to description and analysis rather than to an attempt by the Commission to find a solution. He suggested that the Commission might usefully reflect on that matter before taking action on the topic.

28. By way of preliminary remarks concerning the draft articles on State responsibility, in respect of which his delegation would submit more detailed views in writing before the end of January 2001, he said that he welcomed the streamlining of Part One, in regard to the issues of attribution to the State, of what constituted a violation of an international obligation and of the circumstances precluding wrongfulness. Its architecture was now more classical, and it was also clear that internationally wrongful acts of a State formed a single category. Nevertheless, he had questions and serious concerns about some of the provisions contained in Parts Two and Two bis relating particularly to the new category of "serious breaches" and to certain aspects of the proposed regime governing countermeasures, which departed from existing international law.

29. With regard to the first point, the revised draft appeared to introduce a special regime for serious breaches of obligations which were owed to the international community as a whole and which were essential for the protection of its fundamental interests. His delegation had doubts both about the content and scope of the new category and the consequences of

States' committing such serious breaches. As far as the content was concerned, the text of draft article 41 appeared to combine what were surely two different categories — obligations owed erga omnes and obligations arising from peremptory norms of international law — thus creating a new category of supernorm. If the intention was to codify the dictum by the International Court of Justice in the *Barcelona Traction* case, it could have been done more simply. There were, of course, certain obligations which States owed to all States. The expression currently used — "the international community as a whole" — was, however, potentially misleading. It might usefully be replaced by the phrase "the international community of States as a whole" or, even better, "all States".

30. It was generally accepted that all States had standing to bring a claim in respect of a breach of an obligation owed to all States. That was reflected in draft article 49, paragraph 1 (b), which, rightly, did not limit such standing to serious breaches. His delegation had doubts, however, about the three consequences specifically ascribed by the Commission to the category of "serious breaches". The first proposed consequence was the possibility of an award of damages reflecting the "gravity of the breach". To the extent that that referred to punitive damages, it was questionable whether such damages had a place in international law. If they did, they were surely potentially applicable to certain breaches of any international obligation. The second proposed consequence concerned the obligations arising for third States. The enumeration of such obligations in article 42, paragraph 2, was inspired, no doubt, by the Advisory Opinion of the International Court of Justice in the *Namibia* case. That case, however, had concerned the legal consequences for States of an occupation of territory declared by the Security Council to be illegal. Whether it was possible to speak of a single rule for all purposes was another matter. One way around the difficulty might be to provide a less prescriptive formulation, as in draft article 42, paragraph 1. An additional concern was that including such consequences in a separate chapter devoted to "serious breaches" would seem to imply that they could not apply to any other breaches of obligations, whatever the circumstances.

31. The most difficult issue of all concerned the provision of draft article 54, paragraph 2, permitting a State to take countermeasures "in the interest of the beneficiaries of the obligation breached". Even accepting the proposition, on the basis of the *Barcelona Traction* case, that States at large had a legal interest in respect of violations of certain obligations, it did not necessarily follow that all States could vindicate those interests in the same way as directly injured States. As they stood, the proposals were potentially highly destabilizing of treaty relations. He questioned whether a State should really be able to contravene any of its treaties, including, for example, those of a technical nature, such as postal service agreements, in response to any serious breach by another State of any erga omnes obligations. It should also be asked what would happen if the State most directly affected did not want countermeasures to be taken and how the principle of proportionality would operate in such a situation.

32. It was a difficult problem, and the solution was not obvious. One possibility might be the use of some form of saving clause. Chapter III of Part Two and draft article 54, paragraph 2, could be replaced by a clause to the effect that the draft articles were without prejudice to any regime that might be established to deal with serious breaches of obligations erga omnes. Such an approach would not harm the structure or objectives of the draft articles as a whole.

33. His delegation welcomed the inclusion of an article (draft article 23) recognizing the taking of lawful countermeasures as a circumstance precluding wrongfulness. Countermeasures played an important role in inducing compliance with international law, and their validity had been recognized by international tribunals. Some of the provisions regulating the resort to countermeasures proposed in Part Two bis, chapter II, gave rise to serious concern, however, insofar as they departed from existing law. It was true, for example, that there existed obligations the performance of which could not be suspended by way of countermeasures. Care should, however, be taken in the way that proposition was reflected in draft article 51, the chapeau of which was perhaps misleading in asserting that countermeasures would not involve "any derogation" from the enumerated obligations.

34. Some of the relevant provisions, such as those for the protection of fundamental human rights, specifically allowed derogation in certain circumstances. In some instances, moreover, States had entered reservations preserving the right to take countermeasures. It would be preferable to say that

countermeasures must not involve the breach of those obligations of a State listed in the draft article. Indeed, the Commission should look rigorously at the list. Since the objective of the provisions must be to facilitate the resolution of disputes rather than to complicate them, vagueness and duplication should be avoided.

35. As to the conditions relating to resort to countermeasures, as set out in draft article 53, paragraphs 2 to 5, his delegation found the approach to be misconceived. The alleged duty to offer to negotiate before taking countermeasures, and to suspend countermeasures while negotiations were pursued, did not reflect the position under general international law. The arbitral tribunal in the Air Services Agreement case between France and the United States had stated its belief that it was impossible, in the current state of international relations, to lay down a rule prohibiting the use of countermeasures during negotiations; and that position had not changed. Nor would such a rule be either practical or desirable de lege ferenda. It would force the victim State to have recourse to one particular method of dispute settlement; it might be inconsistent with Article 33 of the Charter of the United Nations; and it might encourage States to break their obligations in order to force another State to the negotiating table.

36. Moreover, it was hard to see what scope to negotiate existed when genocide, for example, was being committed. Paragraph 3 did not solve the matter. The alleged duty, referred to in paragraph 5 (b), not to take countermeasures, or to suspend them, if the dispute had been submitted to arbitration or judicial settlement was equally ill-founded. It, too, found no support in general international law; it could discourage recourse to third-party dispute settlement, and it failed to take account of the possibility that jurisdiction might be disputed. His delegation encouraged the Commission to revise the provisions in order to reflect existing law on the subject.

37. His delegation shared the view, which seemed widespread within the Commission, that the aim should not be to adopt a multilateral convention on the topic. That would be neither realistic nor appropriate. The value of the Commission's work was inherent; it had already made a major contribution to the law of State responsibility by the mere fact of producing a set of articles and commentaries. The International Court of Justice had already had recourse to the Commission's work.

38. **Ms. Xue** Hanqin (China) said that her delegation was gratified that after some 40 years the task of formulating a comprehensive set of legal rules governing State responsibility was near completion. Some questions remained, however. The issue of countermeasures had long been one of the most controversial aspects of the regime of State responsibility. Countermeasures were a legitimate means available to a country injured by an internationally wrongful act to redress the injury and protect its interests. In view of past and possible future abuses, however, the recognition of a country's right to take countermeasures must be accompanied by appropriate restrictions on their use.

39. When commenting on draft articles 30, 47 and 48 on first reading, her delegation had pointed out the need to clarify and improve on the provisions they contained. Some improvements had indeed been made. For example, the ambiguous reference to "interim measures of protection" had been deleted and qualifying phrases had been added to the wording of article 23 (formerly article 30), while other provisions clearly set out both the aims of and limitations on the resort to countermeasures. There was, however, room for further improvement.

40. The desirability of the newly added draft article 54 on countermeasures by States other than the injured State, together with the related draft article 49, remained to be determined. The provisions they contained would obviously introduce elements akin to "collective sanctions" or "collective intervention" into the regime of State responsibility, broadening the category of countries with the right to resort to countermeasures and establish so-called "collective countermeasures". That would, however, run counter to the basic principle that countermeasures should and could be taken only by a country injured by an internationally wrongful act. More ominously, "collective countermeasures" could provide a further pretext for power politics in international relations. The reality was that only powerful States and blocs were in a position to take countermeasures, usually against weaker nations.

41. Moreover, "collective countermeasures" were inconsistent with the principle of proportionality enunciated in draft article 52, for they would become

tougher when non-injured States joined in, with the undesirable consequence that countermeasures might greatly outweigh the extent of the injury. Draft article 54 further complicated the already complex question of countermeasures, so the best solution would be to delete both draft articles 49 and 54. The existence of draft article 56 did not provide enough of a safeguard.

42. Another controversial issue was that of State "crimes". Introducing the concept into international law would encounter insurmountable obstacles in both theory and practice. In an international community made up of sovereign States, *par in parem imperium non habet* was a basic legal principle. Furthermore, Roman criminal law stated that *societas delinquere non potest*. At the same time, rejecting the concept would in no way diminish the personal legal responsibility of a person committing an internationally wrongful act. That was why her delegation had shared the view that the provisions relating to State "crimes" in the draft on first reading should be amended. To some extent the suggestions had been heeded. Part Two of the new text replaced the concept with that of "serious breaches of essential obligations to the international community", and it differentiated between varying degrees of gravity of a breach. Her delegation favoured that differentiation.

43. Two further points, however, should be clarified in relation to draft article 42. First, the phrase "international community as a whole" should be defined in order to prevent any dispute. Secondly, given the importance of the Security Council within the United Nations collective security system, the question of whether the imposition of an international obligation on States would be automatic or would ensue only after a Security Council decision must be settled.

44. All nine articles dealing with dispute settlement procedures in the draft text adopted on first reading, which had been excessively detailed in some respects, had been deleted. Her delegation conceded the need to amend the provisions, since Article 33 of the Charter of the United Nations gave parties to a dispute a range of means of peaceful settlement, but not their wholesale deletion. Some provisions were required. It was to be hoped that the Commission could reconsider the matter and submit a revised text as part of a complete text of draft articles for second reading.

45. **Mr. Manongi** (United Republic of Tanzania), after endorsing the statement made by the representative of South Africa on behalf of the Southern African Development Community, said that he wished to express his delegation's concern regarding countermeasures as part of the regime of State responsibility. It was encouraging that even the Special Rapporteur had appreciated the potential imbalance in the application of countermeasures as an instrument of compliance or redress. Indeed, he had rightly drawn the Commission's attention to the fact that States from Africa or Asia, for example, had seldom taken collective action, pointing out that it was more common among western States. It was therefore not surprising that some non-western States should consider the draft text as primarily seeking to legitimize such a practice, through the development of legal rules on State responsibility based on western practice.

46. It could hardly be refuted that countermeasures were a threat to small and weak States. It was thus misleading to claim that their only purpose was to induce compliance by a wrongdoing State. It was patently clear from the commentary that countermeasures could be punitive in order to satisfy the political and economic interests of the State claiming to be injured. The degree of subjectivity in the application of countermeasures must therefore be a matter of concern.

47. It was of little comfort that, while the Special Rapporteur had not wished to express a view on whether, in the light of State practice, shared perceptions of egregious breaches corresponded to the facts, he had nonetheless observed that "States taking counter-measures do so at their peril, and the question whether they are justified in any given case is one for objective appreciation". An objective appreciation could presumably be attained only through a judicial process, which could generally be instituted only by the alleged offender. The cost of doing so, however, might well be far beyond the immediate capacity of some allegedly responsible States so the question whether the countermeasures were indeed justified and proportional was likely to be left unanswered. Yet, if justice was to be done, even an alleged offender should be guaranteed recourse to due process. In that context, his delegation awaited with interest the Commission's proposals on dispute settlement mechanisms.

48. There were inherent weaknesses in the proposed regime of countermeasures. A wrongful act committed by a State could not be taken to justify an action,

whether by the injured State or any other, which, while initially legitimate, might itself have far-reaching consequences. The interests of third States should also not be discounted. It was disturbing that a right of which the potential spillover was not fully addressed had been formulated.

49. It would be preferable for the Commission to discourage countermeasures by prescribing limits rather than leaving them open-ended and liable to abuse. Similarly, in order to alleviate the concern of small States, the Commission should restore former draft article 50 on "prohibited countermeasures", which had been elaborate and clear. There was no compelling justification for deleting the provision prohibiting an injured State from resorting to "extreme economic or political coercion designed to endanger the territorial integrity or political independence of the State which has committed the internationally wrongful act", which was language commonly used in the General Assembly and contained a principle important to developing States. That principle constituted a necessary balance in any regime of countermeasures.

50. With regard to the text of former draft article 19, his delegation conceded that it might not be necessary to make explicit reference to the notion of "international crimes"; the substance of the draft article remained relevant, however, and there was no reason why examples of serious breaches, which were helpful in clarifying incidents of internationally wrongful acts, should not be reflected in the draft articles.

51. **Mr. Westdickenberg** (Germany), referring to Part Two, Chapter III, of the draft articles, welcomed the deletion of former article 19. By referring to "international crimes", that draft article would have blurred the distinction between State responsibility and individual responsibility; the latter was not covered by the draft articles, as stated in article 58. Decisions on individual criminal responsibility should clearly be reserved for national courts, the international ad hoc tribunals and the future International Criminal Court.

52. Having stated that his delegation acknowledged the existence of fundamental norms of international law, breaches of which were so grave that their effects went beyond the directly injured State. Article 41 as proposed by the Special Rapporteur was a step in the right direction. Nevertheless, his delegation saw the need for a more precise definition, taking into account the special quality of breaches of erga omnes obligations. His delegation also shared the doubts expressed concerning the possible inclusion of punitive damages relating to article 41.

53. The concept of erga omnes obligations and their effects on States not directly injured entailed further problems. The indirect character of the injury must be taken into account in a way that narrowed the options of the State indirectly injured as compared with the State suffering direct injury. In order to distinguish between directly and indirectly injured States, it was necessary to ensure consistency between article 41, paragraph 1, article 49, paragraph 1 (b), and article 50, paragraph 1.

54. While the trend in international law was towards stronger protection of the rights of the individual, if the notion of "interest of the beneficiaries" was meant to limit the scope of possible countermeasures, article 54, paragraph 1, must be interpreted cautiously. Pursuant, to that article, beneficiaries of the obligation breached could be either States or non-States; accordingly, there was a danger that disproportional unilateral acts, which in reality were not justified by the interest they sought to protect, might be disguised countermeasures. That would threaten the credibility of the concept.

55. With regard to the proportionality of countermeasures, it was his delegation's understanding that the three criteria laid down in article were not exhaustive. Furthermore, his delegation welcomed the fact that article 53 set out limits to countermeasures by calling for prior negotiations between the States concerned. That applied also to the provisional measures mentioned in article 53, paragraph 3.

56. Moreover, his Government reiterated its conviction regarding the need to define more clearly peremptory norms of international law that protected fundamental humanitarian values. Articles 21 and 23 must be interpreted in that light. His delegation therefore welcomed the reordering of article 51, paragraph 1, to make it clear, first, that the prohibition against the threat or use of force, the protection of fundamental human rights and the obligations rising from humanitarian law were peremptory norms of international law and, second, that the list was not exhaustive.

57. Lastly, with regard to the obligation of the wrongfully acting State to offer appropriate assurances and guarantees of non-repetition (art. 30 (b)), it was his delegation's understanding that such an obligation

arose as a function of the risk of repetition, the gravity of the wrongful act and the nature of the obligation breached.

58. While his delegation shared the United Kingdom's view that the draft articles should not take the form of a convention, it was open to suggestions.

59. **Mr. Yachi** (Japan) noted with satisfaction that the new draft articles were generally more logical and clearer than those adopted on first reading. International obligations were divided into three categories: bilateral obligations, regardless of their source, multilateral obligations and obligations to the international community as a whole. When it came to invoking State responsibility, the draft distinguished between "an injured State" and a "State other than an injured State" that had an interest in the implementation of the obligation breached. Accordingly, it was now clear that the draft articles were intended to regulate the relations among three parties, namely, responsible States, injured States and States other than injured States.

60. Part Two had been revised to cover the obligations of the responsible State. A new Part Two bis had been added in which content of responsibility was clearly distinguished from invocation of responsibility. While welcoming the enhanced clarity of the draft articles, he wondered whether they were not too innovative. His delegation understood that the general intention behind the draft was to reflect the progressive development of international law. Nevertheless, in order to make a fair judgement of the changes reflected in the draft articles, it was necessary to bear in mind the final form that the draft would take. His delegation supported the general trend in the Commission towards finalizing the draft articles as a non-binding guideline for declaration. In his delegation's view, the draft articles should function in two ways: to inform a State of its rights and obligations if it committed an internationally wrongful act or if another State breached its obligation towards the first State and, more importantly, as a general standard to which international courts could refer in international disputes. In the light of the functions expected of the draft articles, his delegation believed that they should not be adopted as an innovative guideline that did not reflect State practice in international law.

61. His Government had consistently objected to the introduction of the ambiguous notion of "international crime", which was not established in international law. It therefore welcomed the deletion of that term from the draft.

62. Nevertheless, vestiges of the concept remained in the text. Article 41 created a new category, that of a "serious breach by a State of an obligation owed to the international community as a whole". If an obligation fell within that category, then its breach entailed special consequences under article 42. Such consequences involve might include, for the responsible State, damages reflecting the gravity of the breach. It was the obligation of every State to refrain from recognizing as lawful the situation created by the breach, and under article 54, paragraph 2, any State could take countermeasures "in the interest of the beneficiaries of the obligation breached", regardless of the existence or intent of an injured State.

63. Thus, "serious breach" was just another term for "international crime". The core question was whether there was a hierarchy among international obligations and, if so, whether a different regime of State responsibility could be applied to more serious breaches than were applied to less serious ones. While the question related to jus cogens and erga omnes obligations, the content of those concepts had not been sufficiently clarified, nor was there a clear relationship between them and the concept of serious breaches. Accordingly, it might be overly optimistic to assume that current international law had developed to the extent that it was possible to specify what kind of obligations fell into that category.

64. From the standpoint of the structure of the text, the reason for including a provision on serious breaches was to lay the groundwork for the provision on consequences. In other words, if the consequences prescribed for serious breaches were unnecessary, there was no point in stipulating a special category of obligations. Looking closely at the consequences referred to in article 42, it could be stated that the obligation not to recognize the lawful situation created by the breach did not result exclusively from serious breaches. As a matter of course, no internationally unlawful acts should be recognized as lawful or be assisted. Moreover, the obligation to cooperate was not limited to cases of serious breaches.

65. "Damages reflecting the gravity of the breach" seemed scarcely different from the concept of punitive damages, which was not established in international

law. An effort had apparently been made to avoid the problem by inserting the word "may" in article 42, paragraph 1. However, it was not clear who would decide whether a certain obligation "may" involve damages reflecting gravity.

66. Thus, the special consequences in article 42 which provided the raison d'etre for creating a category of serious breaches were neither special nor appropriate. As a matter of law, there was no consensus on which obligations fell into the category covered by article 41. Nor was there agreement on whether, if serious breaches of such obligations occurred, special measures could be taken and, if so, which ones. The creation of such obligations, and their corresponding special consequences was not a task to be undertaken in the context of general, secondary rules, but in the context of primary rules. His delegation believed that articles 41 and 42 had not succeeded in departing from the concept of "international crime" and had no place in the draft.

67. The taking of countermeasures by "States other than injured States" was problematic. Such a provision might be pertinent, in that unlawful situations would not be left unresolved in cases where an injured State was not able to take countermeasures on its own. However, the risk of abuse could outweigh the benefits.

68. His delegation also noted with concern the procedural requirements for taking countermeasures under article 53, pursuant to which injured States had to offer to negotiate with responsible States, and could not take countermeasures while negotiations were being pursued in good faith. Since the responsible State was likely to accept an offer to negotiate, it seemed quite difficult in practice for a State to resort to countermeasures. Accordingly, if a State needed to take countermeasures, it could easily resort to provisional measures while avoiding formal countermeasures, thus making formal countermeasures a hollow procedure.

69. Since the objective of countermeasures was defined as inducing a responsible State to comply with its obligations under Part Two, countermeasures should be allowed to the extent necessary. In accordance with draft article 52 on proportionality, however, "countermeasures must be commensurate with the injury suffered, taking into account the gravity of the internationally wrongful act and the rights in question". His delegation was concerned that that criterion did not necessarily serve the purpose of countermeasures. It might not allow for countermeasures strong enough to induce compliance, or it might allow for excessive countermeasures. Moreover, the element of "gravity" of the wrongfulness was yet another echo of the concept of "international crime".

70. Lastly, with regard to the concept of injury, it was important to distinguish between an injured State and an interested State, since that determined whether a State could seek reparation. In the new text, that distinction was made automatically, based on the category of the obligation breached. As a result, it was difficult to make a distinction between a collective obligation as defined in article 43 and an obligation established for the protection of a collective interest, as referred to in article 49. Since nearly all multilateral treaties established certain collective interests, the question was whether such a distinction was really possible without the notion of injury. One of the reasons why the notion of injury had been dropped was that the breach of a collective obligation as defined in article 43 (b) (ii) could hardly be explained by the traditional notion of injury. It might also be because the draft faithfully pursued a systematic construction of the law of State responsibility based on the type of obligation breached. However, the cost and benefits of pursuing such a highly theoretical approach must be examined carefully. It was unclear whether the notion of a collective obligation had become accepted in international law to the extent that the omission of the concept of injury was justified. The distinction between a collective obligation and one established for the protection of collective interests should be clarified in the commentary.

The meeting rose at 12.30 p.m.

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Chairman: Mr. Politi ..... (Italy)

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Agenda item 159: Report of the International Law Commission on the work of its fifty-second session (*continued*)

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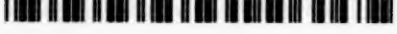

The meeting was called to order at 10.10 a.m.

Agenda item 159: Report of the International Law Commission on the work of its fifty-second session *(continued)* (A/55/10)

1. **Mr. Abraham** (France) expressed concern at the late issuance of the report of the International Law Commission (A/55/10); the availability of Commission documents on the latter's web site, while practical, could not replace their publication in all official languages of the United Nations. The Secretariat should inform States in a timely manner of any problems encountered in that regard.

2. Turning to the question of State responsibility, he said that he welcomed the decision to abandon the concept of internationally wrongful acts under international law as were comparable to crimes and delicts under criminal law (original draft article 19). He agreed with the Special Rapporteur's decision not to dwell on the problem of defining primary rules and hoped that the Commission would confine itself to the codification of secondary rules. He was also in favour of the inclusion, albeit implicit, of a reference to damages in the definition of the injured State.

3. The structure of the draft articles was generally acceptable; however, Part One was too general and might better be entitled "Acts precipitating State responsibility".

4. He reiterated his delegation's objection to draft article 40, which made no reference to material or moral damage to a State arising in consequence of the internationally wrongful act of another State. It was also important to make a clear distinction between the injured State and States which had only a legal interest in the performance of an obligation and to explain the reasons for that distinction.

5. Draft article 43 (a) should make it clear that the obligation in question was of a bilateral nature; it was not sufficient to make that point in the commentary. His delegation did not agree with the members of the Commission who had suggested that third States should be permitted to intervene in cases involving violation of a bilateral obligation if the State directly affected did not wish to respond.

6. Draft article 43 (b) should include specific mention of the damage suffered by the "specially affected" State and of the fact that such damage could include that which resulted from the breach of an obligation which affected States' enjoyment of their rights or performance of their obligations. The meaning of the words "the international community as a whole" was unclear; the wording of draft article 41, which spoke of "a serious breach by a State of an obligation owed to the international community as a whole and essential for the protection of its fundamental interests", should be repeated in articles 43 and 49. In any case, his delegation would prefer "the international community of States as a whole", used in article 53 of the 1969 Vienna Convention on the Law of Treaties. It remained to be established whether the obligations stemming from the language used in article 41 were obligations *erga omnes*, as would appear from the Commission's discussions, and what such obligations would include in the context of the draft articles.

7. Draft article 49, paragraph (1), could be improved by explicit recognition that the States described therein should be qualified as "injured" in that their right to the protection of a collective interest had been violated under an instrument by which they were bound. The proposed wording made it difficult to distinguish between injured States and those which had only a legal interest. It would be better for draft article 49, paragraph 1 (a), to follow draft article 43 (b) or for the Special Rapporteur to make it clear that States with only a legal interest could seek cessation of another State's violation but could not seek reparation for damage caused by an internationally wrongful act by which they were not directly affected. Paragraph 2 (b) should therefore be deleted.

8. There had been significant developments in international law since the first reading of the draft articles; the Statute of the International Criminal Court provided for the trial and conviction of those responsible for the serious crimes referred to in original article 19 and removed all justification for the argument that a State could be guilty of a crime. State responsibility under international law was sui generis; it was neither civil nor criminal in nature. He therefore welcomed the Commission's current approach to the issue and encouraged it to continue along those lines.

9. Draft article 41 referred to "a serious breach by a State of an obligation owed to the international community as a whole and essential for the protection of its fundamental interests". Although the concept had a basis in *jus cogens* and in the decision of the International Court of Justice in the *Barcelona Traction*

case, the exact meaning of the "fundamental interests" of the "international community" remained unclear. In any case, the primary problem lay in the consequences covered by draft article 42; paragraphs 1 and 2 (a) and (b) served no purpose while paragraph 2 (c) was ambiguous and might encourage States to resort to possibly excessive countermeasures in defence of the obligations referred to in draft article 41. In the unlikely event that draft articles 41 and 42 were retained, consideration should be given to placing them elsewhere in the draft, perhaps at the end of Part One, Chapter III.

10. He welcomed the decision not to link the taking of countermeasures to compulsory arbitration, which would amount to giving only the responsible State the right to initiate arbitral proceedings. Generally speaking, the draft articles on State responsibility should cover only reparation for damages and cessation of internationally wrongful acts; the issue of countermeasures should be considered separately by the Commission. However, his Government agreed with the Special Rapporteur's comments on the need to cover both the proportionality and the termination of countermeasures.

11. He welcomed the decision to delete the provisions on dispute settlement; there was no need for a special regulatory mechanism in disputes raising questions of responsibility, which could be resolved under general international law.

12. Although his Government had not yet taken a position on the final form that the draft articles should take, he was not certain that the adoption of a declaration by the General Assembly would be the best solution. A convention would have greater regulatory force and would be more in keeping with the Commission's mandate to develop normative instruments rather than indicative guidelines. Moreover, the adoption of a declaration might cause the rules established in the draft articles, some of which were quite innovative, to be cited as principles without prior implementation in State practice and thus lead to the convening of an international conference to consider their validity.

13. **Mr. Mirzaee-Yengejeh** (Islamic Republic of Iran) stressed that countermeasures should not be used by powerful States as a means of coercing smaller nations. Draft article 50, paragraph 2, should be amended to make it clear that an injured State could not take measures against third States in order to induce the responsible State to comply with an obligation. His delegation would prefer to restore the wording of draft article 50 (b), on first reading, which stated that an injured State should not resort by way of countermeasures to "extreme economic or political coercion designed to endanger the territorial integrity or political independence of the State which has committed the internationally wrongful act"; that wording reflected language commonly used in General Assembly resolutions and contained a principle important to developing States. Furthermore, he disagreed with those who considered that there was no need to refer to "political independence of the State", since that was implicit in "territorial integrity"; Article 2, paragraph 4, of the Charter of the United Nations made a distinction between those two principles, which were not interchangeable.

14. In its current form, draft article 51, paragraph 2, could be taken to imply that the imposition of countermeasures could precede recourse to dispute settlement procedures, thereby allowing powerful States to take countermeasures in order to impose their will regarding the selection of such procedures.

15. Draft article 52 should be simplified; the reference to "the gravity of the internationally wrongful act" should be deleted, as it suggested that the State taking countermeasures was authorized to gauge the proportionality of its own act.

16. Draft article 53 should be amended to make it clear that allegations of an internationally wrongful act must be substantiated by credible evidence before the injured State could take countermeasures. Paragraph 3 and the reference thereto in paragraph 4 should be deleted, since countermeasures were by nature provisional and injured States must not be given occasion to neglect their obligation of notification and negotiation under paragraph 2.

17. It would be better to devote a separate article to the current draft article 54, paragraph 2, as the Special Rapporteur had originally proposed, and to state that where there had been a serious breach of an essential obligation owed to the international community as a whole, countermeasures must be coordinated by the United Nations.

18. Ideally, the draft articles, with the addition of a chapter on the peaceful settlement of disputes, should be adopted as a convention and acceded to by the

overwhelming majority of Member States. However, such an approach would require the convening of an international conference, at which all the articles would be subject to negotiation and compromise, years might pass before the resulting instrument achieved a sufficient number of signatures for entry into force. Adoption of the draft articles as a declaration by the General Assembly might be preferable; the Commission could facilitate the achievement of that objective by producing a balanced instrument incorporating the views of all Member States. Moreover, such a declaration would not preclude the elaboration of a convention on State responsibility in the future. In any event, after nearly five decades of deliberation, the Commission should complete its work on the project during the current quinquennium.

19. **Mr. Baker** (Israel) said that in his report on State responsibility, the Special Rapporteur had made a clear and extensive analysis of the topic, itself an important contribution to international legal scholarship in the field. Many improvements in the text of the draft articles reflected comments made in the Committee and an attempt to adhere more closely to existing customary law and the actual practice of States. That was a commendable approach, because State responsibility was part of the infrastructure of international law, and the focus should therefore be on codification rather than progressive development. Unless the new rules reflected existing customary law, States would be reluctant to support them.

20. He had reservations about the wording of draft article 16 (b), which implied that a State which facilitated or assisted in the breach of an obligation by another State would not be committing a wrongful act if the obligation in question was not binding upon it. That wording effectively sanctioned assistance to wrongdoers in certain cases. It might be preferable to opt for the wording of draft article 2, as adopted on first reading, which avoided that interference. He expressed similar reservations with regard to draft articles 17 and 18. Draft article 17 implied that a State could direct and control another State in the commission of a wrongful act, as long as that act was not wrongful for itself. Draft article 18 would seem to allow a State to coerce another State to commit an act which, although not wrongful for the coerced State, might well be wrongful for the coercing State. He suggested reviewing those provisions.

21. He regretted the failure to retain in article 20 the exception regarding the ineffectiveness of consent in cases of peremptory obligations, which was an important principle of international law. As for forms of reparation, he pointed out that the modalities cited as examples of satisfaction in article 38, paragraph 2, all shared similar characteristics and that it would therefore be useful to cite other examples, such as nominal damage and disciplinary or penal action, with a view to better expressing the range of options available in cases where satisfaction was deemed necessary.

22. Concerning the matter of interest, now covered in article 39, he reiterated his delegation's previous view that interest should be regarded as an integral part of compensation, in which case the issue should be incorporated into the existing article on compensation. In addition, the stipulation that interest was payable only "when necessary in order to ensure full reparation" was unwarranted insofar as it was difficult to envisage a situation where interest would not be due.

23. Turning to the most contentious aspect of the draft articles, relating to the invocation of responsibility by States other than the injured State, he welcomed the decision to set aside the distinction between crimes and delicts and refine the distinction between the States directly affected by a breach and those with an interest in the performance of an obligation. Such a change was essential to ensuring that the draft articles accorded with contemporary State practice and customary law and that they received the widest support.

24. Nevertheless, the draft articles did not go far enough in applying the consequences of that change to the issue of the invocation of responsibility. The definition of serious breaches of essential obligations to the international community contained in article 41 was so general as to be open to dangerous abuse by States purporting to act in the interests of the international community. Similarly, the obligation contained in article 42, paragraph 2 (c), for States to cooperate as far as possible to bring such breaches to an end was too broad, as well as unsupported by international law, and might also undermine existing collective mechanisms designed to regulate and coordinate international responses to serious breaches. In such cases, it was inappropriate and unwise to impose a general and unspecified legal obligation upon third States.

25. In his view, the legal capacity of interested States, as opposed to injured States, was currently limited to their ability under customary law to call for the cessation of unlawful conduct and for reparation to be made to the injured State. He supported neither the implication in article 49, paragraph 2, that interested States could act as a kind of trustee for the injured State in seeking reparation, nor the general position adopted in article 54 according to which States could engage in countermeasures, as such provisions would have a destabilizing effect by creating a parallel mechanism for responding to serious breaches which lacked the coordinated, balanced and collective features of existing mechanisms. In that regard, he wished to echo the statements already made to the effect that those provisions went beyond existing law and were unwarranted.

26. The deletion of the distinction between crimes and delicts had not resolved the controversy regarding the legal consequences of serious violations of international law. Instead, the debate on such matters had merely been transferred from article 19 to those provisions dealing with the invocation of responsibility by non-injured States. He therefore recommended that all controversial aspects of that issue should be set aside with a view to separate treatment pursuant to developments in international law and practice by way of a saving clause, for example, which would not diminish the usefulness of or impair the overall structure of the draft articles. He also felt that the present location of the articles on that subject throughout Part Two and Part Two bis confused the otherwise logical division of the draft articles. He therefore proposed that the matter should be brought to the attention of the Drafting Committee.

27. **Mr. Gupta** (India) observed that because of the tireless efforts of the Special Rapporteur, the Commission had almost completed its second reading of the draft articles. However, several issues still required careful consideration, such as State responsibility for breaches of obligations *erga omnes* and the suitability of the substitution made for draft article 19 adopted on first reading. The overlap between a breach of multilateral obligations and the legal consequences of wrongful acts, and their relationship with the Charter of the United Nations, also called for in-depth consideration. He hoped that when finalizing the draft articles, the Commission would draw an appropriate distinction between State responsibility as such and liability for transboundary damage from hazardous activities, for which the operator of the activity was primarily responsible.

28. The changes to the draft articles recommended by the Drafting Committee at the end of its recent session were generally acceptable. He expected the Commission to elaborate further the principle of exhaustion of local remedies, referred to in the new draft article 45, in the context of its work on diplomatic protection.

29. The question of the right of States to take countermeasures was open to serious abuse. He would have preferred to exclude that question altogether from the scope of State responsibility, leaving issues concerning such measures to be dealt with under general international law, especially under the Charter of the United Nations. He welcomed the restrictions placed on countermeasures in draft articles 51, 52 and 53. Countermeasures were merely sanctions under another name. They should not be used to punish a State, and their humanitarian consequences and the need to protect civilian populations from their adverse effects must be kept in mind. Paragraph 5 of draft article 53 was unclear. In his view, countermeasures could not be taken and, if taken, must be immediately suspended, if an internationally wrongful act had ceased or if the dispute had been submitted to a court or tribunal with authority to hand down binding decisions. Moreover, there was no provision in the draft articles to ensure that countermeasures did not have adverse effects for States other than the one targeted.

30. The distinction sought to be made between an injured State as defined in draft article 43 and in draft article 49 appeared to turn on the phrase "is of such a character as to affect" in draft article 43 (b) (ii). It was therefore implied that in the case of integral obligations all States were affected, and in the case of a collective interest, States not directly affected were interested only in the performance of an obligation. That was too subtle a distinction between the two categories of States, and should be reviewed in order to avoid unnecessary confusion and possible abuse. The difference between "integral obligations" and "collective interest" also required further elucidation.

31. Draft article 31, paragraph 2, defined injury in a very broad sense, since moral injury could include non-material damage as well as legal injury. The causal link

between the wrongful act and the injury suffered was determined by the primary rule, so the facts had to be known before the distinction between directly injured States and other States could be ascertained. The definition of injury allowing for the right of States to invoke the responsibility of another State for wrongful acts committed against the collective interest was a new and evolving concept in international law. The concept of obligations *erga omnes* was indeterminate and raised difficult issues concerning the requisite legal interests and the standing of States in a particular situation. States and other members of the international community practised a form of global networking; however, that did not necessarily equate to an international community with identified rights of its own. A general provision enabling more than one State to invoke the responsibility of another in respect of a wrongful act could give rise to serious abuses until there was a definition of "collective interests" and the means of implementing and enforcing them.

32. The same difficulties attached to draft article 41, which replaced the former article 19, dealing with the concept of an "international crime". Moreover, it was for the international community itself, acting through a unanimous or nearly unanimous decision, in a forum which admitted of universal participation by States, to determine the essential obligations for the protection of its fundamental interests. He recommended the deletion of draft article 41; retaining it might invite the criticism that the Commission was engaged in drafting a primary rule, thereby exceeding its mandate.

33. According to draft article 49, paragraph 2, any State other than an injured State could seek the cessation of an internationally wrongful act, as well as assurances and guarantees of non-repetition. It was not clear, however, whether the actions of such a State had to be subordinated to, and coordinated with, the response desired by the directly injured State, or whether the former State could act independently, albeit in the interest of the directly injured State.

34. He could accept the treatment in Part Two of the legal consequences of an internationally wrongful act and the various forms of reparation. It should be made clear, however, that the latter did not occur automatically but were essentially options available to the injured State to seek from the responsible State at its own discretion.

35. In conclusion, he emphasized that it would be helpful to state explicitly that the draft principles on State responsibility were residual in character and would come into play only if and to the extent that the primary rule or special regime agreed to by the State concerned had not specified the consequences of a breach of obligations.

36. **Mr. Lavalle-Valdés** (Guatemala) said that draft article 2 would be improved by inserting after the word "when" the phrase "none of the circumstances excluding wrongfulness according to chapter V of this Part are present".

37. With regard to draft article 10, he thought it might be advisable to restore paragraphs 1 and 2 of article 14 adopted on first reading. Paragraph 1 of draft article 10 did not deal with movements other than insurrectional movements. However, paragraph 2 of that article seemed to imply that such a movement could establish a new State throughout the territory of the former State. It did not seem reasonable to suppose that it could acquire jurisdiction over a part but not the whole of the State. He therefore suggested inserting the words "or other" after "insurrectional" in paragraph 1.

38. Paragraph 1 of draft article 15 would express more clearly the intention of the drafters if the words "defined in aggregate as wrongful" were replaced by "capable of being regarded in aggregate as wrongful".

39. The rules in chapter IV of Part One were presented as secondary rules, but were essentially primary rules, and he thought it might be better to delete the chapter. In any event, chapter IV did not cover all the subject matter indicated by its title, since there was no rule on the effects of a guarantee given by a State for the international obligations of another State. Paragraph (b) of draft article 16 enabled a State to assist another to commit acts which were internationally wrongful for the latter State but would be lawful on the part of the former. That did not comply with the most basic requirements of justice. For instance, if State A had a treaty obligation towards State B to allow certain products to enter its territory, and it imposed a prohibition on them in breach of that obligation, it might be assisted through a similar prohibition by a State C bordering upon it which did not have the same obligation but knew the prohibition was unlawful for State A. The same could be said, mutatis mutandis, of paragraph (b) of draft article 17 and paragraph (a) of draft article 18. In most cases,

coercion of another State would in itself be unlawful, since it would normally involve unwarranted interference with the internal or external affairs of that State, or the implied threat of the use of force. Thus paragraph (b) of draft articles 16 and 17, and paragraph (a) of draft article 18, should all be considered afresh.

40. In draft article 21, he would like to see a reference to decisions taken by the Security Council under Chapter VII of the Charter.

41. He had some difficulty with chapter II of Part Two. It contained three draft articles, 36, 37 and 38, dealing with the three types of reparation — restitution, compensation and satisfaction. However, draft article 39 seemed to specify payment of interest as a fourth type. Draft article 39 should become paragraph 3 of draft article 37.

42. The reference in paragraph 1 of draft article 49 to responsibility under paragraph 2 was misplaced, since paragraph 2 conferred a right and did not impose conditions. The reference should be to paragraph 3. In paragraph 2 (b), the phrase "in the interest of the injured State or of the beneficiaries of the obligation breached" appeared to be a kind of *negotiorum gestio*. However, it should perhaps be confined to cases in which the injured State was not in a position to exercise its right to invoke responsibility under draft article 49. In draft article 50, paragraph 3, the words "the resumption of performance of the obligation or obligations in question" should be replaced by "subsequent compliance with the obligation or obligations in question", since some of the obligations might be instantaneous in character, for instance the payment of a sum of money.

43. He had two concerns relating to chapter II of Part Two bis. First, because of the imbalance in the economic and other forms of influence between different States, the effectiveness of recourse to countermeasures would vary considerably, and it was possible that the countermeasures would aggravate the negative consequences of such inequalities. Secondly, the use of countermeasures might seriously exacerbate tension between States parties to a dispute. State A might impose countermeasures for a breach of international law imputed by itself to State B but not demonstrated in a manner opposable to State B, and State B might reject the imputation on the basis that the countermeasures were illicit, in turn imposing countermeasures on State A, which might retaliate in similar manner. He joined with the representatives of the United Republic of Tanzania and the Islamic Republic of Iran in preferring the provision in the draft adopted on first reading, which forbade the use of countermeasures involving extreme political or economic coercion such as might endanger the territorial integrity of political independence of the State subject to the coercion.

44. The issue of "remoteness of damage" had not been resolved in the draft articles. The omission should perhaps be remedied, although he doubted whether primary rules existed in most cases to cover the point.

45. **Mr. Janda** (Czech Republic) said that he welcomed the deletion of former article 19, in which connection his views closely mirrored those expressed by the representative of Germany. He did not, however, share the concerns which had been voiced in connection with the principle of non-repetition covered in article 30, and he thus supported its incorporation in the draft articles on State responsibility, since it still had a place, albeit limited, in daily diplomatic practice. He also believed that any effort to distinguish that principle as a political statement or a legal term was more relevant in the context of the Commission's work on unilateral acts.

46. In the context of State responsibility, assurances of non-repetition were closely and logically related to the obligation to cease the wrongful act and could, in some contexts, offer tangible proof that the State having committed an internationally wrongful act recognized its unlawful conduct. He marginally preferred the wording of the text proposed by the Drafting Committee to that proposed by the Special Rapporteur, as it reflected cessation and non-repetition as two separate concepts. He was honoured that the words "if circumstances so require", proposed by his delegation, had been included in article 30 (b), as the dependence of the concept on the particular context was now better expressed as a result.

47. In regard to reparation, the two vital questions were, first, whether it was realistic and justifiable to aim for full reparation as opposed to simply as much reparation as possible to remedy the consequences of the wrongful act, and secondly, whether the forms of reparation should be prioritized. History had proven that insistence on full reparation could sometimes do more harm than good. Equally, however, such mistakes did not prove the principle of full reparation to be

wrong. On the contrary, the principle per se had no defects and there was no reason to depart from it. The concept of full reparation was also directly related to former article 43, paragraph 3, which provided that reparation should not deprive the population of a State of its own means of subsistence. In his view, the two approaches were not contradictory and could therefore coexist. Application of the principle of full reparation should be limited, however, in order to ensure the protection of items required for livelihood.

48. As for the priority assumed by the forms of reparation, monetary compensation was clearly important, particularly since it was often politically difficult for States to return expropriated property, which was often the subject of disputes. In his view, therefore, restitution remained valid as a primary means of reparation, and compensation should serve as a secondary instrument only when restitution was impracticable. Although such a succession of forms of reparation was sufficiently expressed in the draft articles adopted by the Drafting Committee, the rule of priority should also be reflected in the provision contained in article 42, paragraph 2, pursuant to which an injured State had full discretion to decide what form reparation should take. In his view, an injured State should first be obliged to demand restitution if it appeared to be materially possible.

49. As for satisfaction as the third form of reparation, he noted with concern that the concept of non-material or moral injury was absent from the text adopted by the Drafting Committee in deference to the view that the applicability of satisfaction would otherwise be too narrow and provide no scope for a right to satisfaction in the context of material injury. He was convinced, however, that satisfaction should be specially tailored to the reparation for an injury which had no material character. In the case of material injury, satisfaction might be an additional form of reparation accompanying restitution or compensation, but was hardly an alternative to the first two forms. In the case of material damage, satisfaction was neither proportionate nor sufficient. The linkage between satisfaction and non-material injury should therefore be retained.

50. Lastly, although he favoured incorporation of the concept of mitigation of responsibility into the draft articles, he questioned the legal precision of such a term, which he perceived as contradictory in that legal responsibility either existed or did not exist. In his view, the principle should be analogous with the concept of mitigating circumstances as applied in criminal law. In other words, in the context of State responsibility, a State's responsibility would not be mitigated, but the legal consequences of the wrongful act could be made less severe or intense for that State. He therefore proposed altering the words "mitigation of State responsibility" to read "mitigation of legal consequences of an internationally wrongful act".

51. **Mr. Lammers** (Netherlands) said he could agree to the deletion of the concept of an international crime, which had proved controversial. Its replacement, in Part Two of the draft, by a chapter dealing with serious breaches of essential obligations towards the international community as a whole was a compromise solution, adopted in order to avoid jeopardizing what had been achieved so far. Nevertheless, there was still a problem of definition. The Commission should examine more closely the concept of "serious breaches" in draft article 41, in order to find the most appropriate wording. The title of chapter III should be harmonized with the heading of draft article 42. The examples of international crimes listed in the former draft article 19 had been deleted. That might be regretted, although he understood the Special Rapporteur's wish to transfer such material to the commentary. The definition of "serious breaches" also affected a number of articles in Part Two bis on the implementation of State responsibility, to which his delegation would return in its written comments.

52. According to draft article 49, paragraph 2 (b), a State other than the injured State could seek from the responsible State compliance with the obligation of reparation under chapter II of Part Two. However, in the event of a serious breach of an obligation owed to the community as a whole one would also expect a provision allowing such a State to seek compliance under chapter III of Part Two, namely, damages reflecting the gravity of the breach in the interest of the injured State or of the beneficiaries of the obligation breached. He questioned the distinction drawn in draft articles 42 and 49 between the "injured State" and "States other than the injured State". It could be argued that all States were injured by the legal consequences of a serious breach of an essential obligation to the international community, although some might be specially affected. In the earlier version of the draft articles, in the case of an international crime the concept of "injured State" comprised all States.

53. With the deletion of the concept of an "international crime", the specific legal consequences included in the former draft article 52 had also been deleted. All that now remained of such consequences were "damages reflecting the gravity of the breach". The text should be more specific. Either article 52 or the commentary should include a provision that "serious breaches" called for damages exceeding the material losses suffered in consequence of the breach.

54. **Mr. Klingenberg** (Denmark), speaking on behalf of the Nordic countries, said that he attached great importance to the successful conclusion of the monumental project represented by the draft articles on State responsibility. Generally speaking, he was very satisfied with the streamlined draft articles adopted on second reading, which were a considerable improvement on those adopted on first reading in 1996. Notwithstanding further changes, they were, by and large, worthy of adoption as a legally binding convention.

55. He endorsed the new four-part structure of the draft articles, Part One of which presented no major difficulties, although the wisdom of introducing the qualification of "knowledge of the circumstances" in articles 16 to 18 was questionable in view of the fact that it was not specified as a requirement in article 2 concerning the elements of an internationally wrongful act. He also had ideas for streamlining articles 4 and 9, the details of which he would discuss on another occasion.

56. Chapters I and II of Part Two of the draft articles were particularly clear, concise and well structured, while Chapter III was an acceptable compromise, resolving the earlier distinction between delicts and crimes. In that connection, the essential point was that violations such as aggression and genocide were such an affront to the international community as a whole that it was vital to distinguish them from other violations.

57. The new Part Two bis was also a clear improvement on the previous draft, and Chapter I in particular read well. The somewhat controversial article 49 providing for the invocation of responsibility by States other than the injured State was acceptable to the Nordic countries, which regarded it as necessary in the context of the provisions concerning serious breaches of obligations to the international community as a whole.

58. Chapter II contained all the essential elements for regulating the sensitive issue of countermeasures, which was rightly placed in the context of implementing State responsibility rather than in that of circumstances precluding wrongfulness. While he was pleased that punitive actions were outlawed under article 50, paragraph 1, it was nevertheless crucial to establish strong safeguards against possible abuses of countermeasures. It was also vital to keep in mind the favourable advantage of powerful States, which were often the only States with the means to avail themselves of the use of countermeasures to protect their interests.

59. Noting that the current draft articles appeared to favour the resort to countermeasures, he said that he would like the provision contained in article 53, paragraph 5 (b), concerning the effect of binding settlement procedures on the taking of countermeasures to appear in a separate article immediately following article 50. He firmly believed that there was no room for countermeasures in cases where a mandatory dispute settlement procedure existed, except where that procedure was obstructed by the other party and where countermeasures were urgent and necessary to protect that party's interest in the event that the dispute had not yet been submitted to an institution with the authority to make decisions that could protect such interest. On that basis, article 51, paragraph 2, could become redundant. He would also prefer the adoption of a more negative approach in article 52 by substituting the words "be commensurate with" with the words "not disproportionate to" and omitting the final phrase of the provision. Lastly, he said that the four saving clauses contained in Part Four of the draft articles were acceptable to the Nordic countries.

60. **Mr. Skelemani** (Botswana) said that the statements on State responsibility had shown that almost all delegations felt that the international law governing State responsibility needed clarification. The Commission had produced work of high quality to that end, even if individual aspects were open to improvement. The draft articles should therefore be adopted in a form showing that the United Nations considered them a good compromise. The end document should be binding and accepted as a codification of established international law on the subject.

61. Turning to specific issues, he wondered whether the heading of draft article 49 was strictly correct. The

law should generally discourage States which had not been injured from becoming involved and crying more than the bereaved. According to his understanding, the State referred to in article 49, paragraph 1, was injured in the sense that the breached obligation protected a collective interest or the interest of the international community. In such a situation, however, no State should by itself, without the concurrence of at least a substantial number of other concerned States, invoke the responsibility of another State. Draft article 43 adequately covered the position of an injured State and there was no need for that State to act unilaterally if its interests were equally affected with those of other States.

62. When a State's interests were injured, it would want to protect its interests and should be allowed to do so. Draft articles 23 and 50 to 55, however, attempted to restrict the right to act in self-defence. The Commission might well be on the right track in trying to govern or restrict the exercise of countermeasures, but, in view of the right to self-defence, countermeasures could not be prohibited altogether. He supported the suggestion by the representative of the United Republic of Tanzania that a list of prohibited countermeasures would be useful.

63. A more glaring problem was that an interested State, even if not injured itself, might take countermeasures without even consulting the affected States. To that extent, the scope of draft article 54 was too wide. It was open to abuse by powerful States against a weaker State that they might particularly dislike for other reasons. The role of the one international policeman State should be controlled. A situation in which a State was both judge and jury should be avoided.

64. **Mr. Basabe** (Argentina) said that the Commission's work on State responsibility constituted a landmark in the codification of international law. The adoption of a distinction between primary and secondary rules had made it possible to avoid a whole range of theoretical and practical obstacles. In its final form the document should probably be adopted as a convention, if that was acceptable to a majority of States, although his Government could also support the option of adopting it as a declaration within a General Assembly resolution for the time being. A convention, however, even without universal participation, tended to have a greater impact than a declaration, since the danger with the latter was that it would fall into oblivion. There was no risk of such a fate befalling the draft articles on State responsibility, however, such was the importance and quality of the Commission's work.

65. The draft text had managed to deal satisfactorily with two of the most controversial aspects of the topic. It had been useful to jettison the expression "State crimes", which could have led to conceptual confusion in an area where caution was required. His delegation continued to believe, however, that there should be a special category of particularly serious breaches by a State of its obligations to the international community as a whole. It was important both to include a differentiated scale of responsibility according to the seriousness of the wrongful act and to reflect that scale adequately in the draft articles. The Commission had triumphantly achieved both objectives, without overloading the text. It was also gratifying that the Commission had recognized the need to distinguish between an injured State and another State with an interest in the situation, as his delegation had longed argued should be the case. Draft article 49 set out the situations in which a State other than the injured State was entitled to invoke the responsibility of another State and the procedure to be adopted for such invocation.

66. As far as countermeasures were concerned, his delegation believed that they should be resorted to only in exceptional circumstances, with due regard for prevailing circumstances within the international community and with every care to preserve a balance between the need for countermeasures and the need to avoid their abuse. Part Two bis, chapter II, set out the necessary limitations and conditions. The rules governing collective countermeasures should be even stricter than those governing bilateral ones. The rules in the draft articles were acceptable, in that they established reasonable restrictions.

67. Other observations or requests for clarification would be addressed directly to the Commission, which had by and large produced an excellent set of rules on State responsibility.

68. **Mr. Hoffmann** (South Africa), speaking on behalf of the Southern African Development Community (SADC), commented first of all on the newest topic before the Commission, Diplomatic protection. The Commission had correctly decided that the use of force to protect nationals abroad fell outside the scope of the topic, which was concerned only with

peaceful procedures for the protection of nationals. It had also been correct in deciding that State practice did not support a rule obliging States to exercise diplomatic protection on behalf of its nationals, even if they should be more active in protecting the human rights of their nationals abroad. There was a wealth of State practice, case law and academic writings on diplomatic protection. There had also been several attempts at codification.

69. Nevertheless, there was great uncertainty as to many of the rules governing the admissibility of claims. The Special Rapporteur had so far focused on questions of nationality, particularly the protection of dual and multiple nationals. The decision by the International Court of Justice in the *Nottebohm* case of 1955 raised more questions than it answered. While States should not be permitted to exercise diplomatic protection on behalf of nationals who had acquired their nationality by fraudulent or improper means, the *Nottebohm* decision went too far if it held that there should always be an effective and genuine link between the national and the protecting State. It would leave many individuals, who had acquired nationality by birth, descent or proper naturalization but had lived outside their national State for many years, with no State capable of exercising diplomatic protection on their behalf. Dual nationals presented a particular problem. While there was no objection if either State of which an individual was a national protected that individual against a third State, difficulties arose when one State of which an individual was a national wished to claim for injury to that individual committed by another State of which the individual was a national.

70. Traditionally, a State could not protect an individual against another State in such circumstances. Since the *Nottebohm* case, however, the position seemed to have changed and tribunals had upheld the right of the State with which the individual had the most effective link to bring a diplomatic claim against another State of nationality with which the individual had a weaker link. It was a development requiring careful consideration, particularly where the injured individual had obtained special privileges in the defendant State on account of his nationality. On the other hand, it was difficult to resist a right of diplomatic protection where the defendant State by law prohibited the individual from renouncing his nationality and the individual had an effective link with the new State of nationality. Such competing considerations should be carefully weighed and balanced in the formulation of any rule.

71. The Commission had shown some support for a rule allowing a State in which a stateless person or refugee had lawful and habitual residence to exercise diplomatic protection on behalf of that person. That accorded with developments in the field of human rights, but it must be made clear that there was no duty on the State of residence to exercise such protection, since it might deter States from providing asylum to refugees and stateless persons. Diplomatic protection was closely linked with the topic of State responsibility and it was therefore appropriate that the Commission should direct its attention to the former.

72. By contrast, there was a dearth of judicial decisions or State practice on the topic of unilateral acts of States. It was, however, an important topic. States should be more forthcoming with evidence of their State practice, for otherwise it would be difficult for the Special Rapporteur to assess the expectations of States. It might, moreover, be a subject in which progressive development based on general principles of law could play a more important role than codification. The Vienna Convention on the Law of Treaties of 1969 provided a useful frame of reference for unilateral acts, but the Commission should not be overinfluenced by the Convention, given the important differences between treaties and unilateral acts. SADC endorsed the recommendations contained in paragraph 621 (a), (b) and (c) of the report concerning further work on the topic.

73. With regard to the topic of reservations to treaties, he said that the provisions of the Vienna Convention laid the foundation for the law governing reservations but left many questions unanswered. The guidelines, with commentaries, being prepared by the Commission would be of considerable assistance to States. Those dealing with the distinction between reservations and interpretative declarations were particularly helpful, since in practice States often resorted to both devices in order to limit their treaty obligations. Moreover, the guidelines were instructive on procedures that could be followed to achieve the same results as reservations. In that regard, draft guideline 1.7, on alternatives to reservations and interpretative declarations, would be especially useful. Late reservations presented particular problems. The Special Rapporteur's proposals, which while acknowledging that the principle was not absolute,

respected the traditional view that a reservation could not be made after a State had expressed its consent to be bound, were a blend of good sense and flexibility.

74. The current debate concerning the competence of human rights monitoring bodies to pronounce on the compatibility of reservations with the object and purpose of the treaty, with the monitoring bodies holding one position and the Commission and several States the other, should be resolved sooner rather than later. The Special Rapporteur's suggestion that the Commission should consider the matter in 2001 was therefore welcome. By finding a solution reconciling the divergent views the Commission would be performing an invaluable service to the international community.

75. As for the draft articles on international liability for injurious consequences arising out of acts not prohibited by international law (prevention of transboundary damage from hazardous activities), the Special Rapporteur had adopted the correct approach: the draft articles should not be substantially revised, since States had already shown support for the text adopted on first reading. The Special Rapporteur had also rightly opted to retain the phrase "appropriate measures" in article 3 rather than the phrase "due diligence", which was notoriously unclear. Moreover, since the draft articles were designed to expound the principles of risk management, draft article 1 should be retained, for it made clear that the draft articles applied to activities not prohibited by international law.

76. Lastly, SADC suggested that the following topics should be the next for consideration by the Commission, assuming that the latter completed the second reading of the draft articles on State responsibility by the end of its 2001 session: responsibility of international organizations, which logically followed on from the topic of State responsibility; the effects of armed conflict on treaties, a particularly pertinent topic in view of the continuing conflict in the Great Lakes region and other parts of Africa; expulsion of aliens, a topic which would supplement the study of diplomatic protection; and the additional topic of the legal aspects of corruption and related practices.

The meeting rose at 12.30 p.m.

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Chairman: Mr. Politi ..... (Italy)

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Agenda item 159: Report of the International Law Commission on the work of its fifty-second session (*continued*)

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00-70911 (E)

The meeting was called to order at 10.10 a.m.

Agenda item 159: Report of the International Law Commission on the work of its fifty-second session (*continued*)

1. **Ms. Hallum** (New Zealand), referring to draft article 30, said that assurances of non-repetition were required not only where there was a pattern of repetition of the wrongful act, but also where there was a risk of repetition. Alternatively, assurances were appropriate where the breach was particularly grave, even if the risk of repetition was minimal.

2. The draft articles reflected the fundamental principle of full reparation for injury. Restitution should be recognized as the best means of reparation and should be understood as restitution in full in the general sense, rather than as a requirement to restore the exact situation which existed before the breach. There might, however, be occasions where restitution alone could not provide full reparation. As for compensation, it should be addressed by means of a flexible formula, allowing the rules on quantification to develop through practice and decisions; she therefore supported the approach adopted in draft article 37. It would not be helpful to set out detailed guidance on quantification, as that would not only make conclusion of the draft articles more difficult, but might also prove to be insufficiently flexible to meet all the circumstances that might arise.

3. Interest on any economic loss should be assessed from the date on which the damage occurred, although that date might not be appropriate in all cases; her delegation therefore supported the flexibility reflected in draft article 39, paragraph 2.

4. Satisfaction represented the corollary of a declaration by a court that an act was internationally wrongful; it should therefore be included as a separate form of reparation. Satisfaction also served to provide reparation for non-material injury and the reference to "injury" in draft article 38, paragraph 1, should be understood in that light. Her delegation supported the principle of proportionality so as to prevent excessive demands in respect of satisfaction.

5. The question of how to treat serious breaches of essential obligations to the international community had been the subject of considerable debate. The attempt to create a distinction between crimes and delicts had distracted attention from the shared concern with responding to such breaches. She therefore supported the deletion of former draft article 19 and welcomed the approach taken in the new Part Two, Chapter III. At the same time, she did not believe that the deletion of article 19 had any implications for the existence in law of the notion of international crimes.

6. The introduction of the new Part Two bis represented two useful developments: first, a conceptual shift from the responsible State to the right of a State to invoke responsibility, and second, the distinction between injured States and States with a legal interest in the performance of an obligation, as set out in draft articles 43 and 49. States which, although not injured, had a legal interest in the performance of the obligation breached should be entitled to invoke responsibility for the breach of the obligation but not to receive the range of remedies available to States which had suffered actual injury. She concurred also with the definition of "injured State" in draft article 43, which recognized the increasing diversity of international obligations.

7. She supported the inclusion of provisions relating to countermeasures in Part Two bis, Chapter II, while considering that countermeasures must be both necessary and proportionate. As a basic principle, countermeasures should not take the place of dispute settlement and should not be imposed if good-faith attempts to resolve the dispute were continuing.

8. She supported the description of the object and limits of countermeasures set out in draft article 50. In particular, she believed that countermeasures should not be limited to non-performance of a reciprocal obligation, and that States should be entitled to suspend the performance of an obligation unrelated to the obligation breached, provided that the principles of reversibility and proportionality were met.

9. **Mr. Giralda** (Spain) said that the International Law Commission should conclude its work with the adoption on second reading of a draft convention that would then be submitted to States for discussion and approval. While mindful of the difficulties involved, he believed that was a close connection between the presence in the draft of imprecise rules and the need for a dispute settlement system, led logically to the adoption of a binding instrument.

10. Draft article 45, relating to the rule of exhaustion of local remedies, did not specify the legal nature of

the remedies in question; however, the fact that the exhaustion of local remedies was one of the conditions for the admissibility of claims implied that the remedies were of a purely procedural nature. Accordingly, the rule should be included in Part One of the draft text, as in the 1996 version. The same applied to draft article 56, which was now a general provision applicable to the text as a whole, whereas in the earlier version its application had been limited to the draft articles in Part Two. His delegation believed that the article should be drafted in positive terms, in other words, that its application should be "without prejudice" to the application of other special rules of international law. The article should also contain a saving clause to the effect that specific regimes should not take precedence over peremptory norms of international law.

11. Draft articles 41 and 42 introduced the concept of "a serious breach by a State of an obligation owed to the international community as a whole", replacing the controversial former article 19. He supported the regulation in the draft articles of a heightened regime of international State responsibility. The name of such a regime was not as important as its content; however, it was not possible to avoid the opposition of many States to the criminal-law connotations of the term "international crime". He therefore had no objection to the use of the term proposed by the Drafting Committee in the heading of Part Two, Chapter III.

12. As regulated by draft article 41, the definition of wrongful acts could consist solely of a reference to the consensus established in the international community, as envisaged in article 53 of the 1969 Vienna Convention on the Law of Treaties. While such a definition might be criticized as tautological, there appeared to be no alternative at the current stage of development of the international legal order.

13. The greatest difficulty resided in the implementation of the heightened regime of international responsibility when a "serious breach" was committed. Such a regime could have various consequences. First, an express reference should be made to the international rules on individual criminal responsibility, such as the Rome Statute of the International Criminal Court. Second, he could accept, with certain exceptions, the inclusion of the concept of "damages reflecting the gravity of the breach" (art. 42, para. 1), as well as the proposal contained in article 54, paragraph 2. Nevertheless, both those consequences and the substantive ones contained in the draft article 42 remained largely imprecise. The Commission should clarify the obligations of all States as provided for in draft article 42, both in the text of the article and in the commentaries.

14. Even those steps, however, would not eliminate the imprecision of the wording, which his delegation believed could best be addressed through the inclusion of an institutional dispute settlement mechanism. It was regrettable that in the current draft, the Commission had neglected to include a Part Three on dispute settlement, especially given that such an omission, as implied in paragraph 311 of the report, was due to the Commission's apparent rejection of the possibility that the draft would become a legally binding convention. He would therefore support a system similar to the one contained in articles 54 to 60 and annex I of the 1996 draft, including resort to the International Court of Justice to hear disputes relating to new draft articles 41 and 42, once other dispute settlement procedures had been exhausted. That would allow for the formulation of reservations solely in relation to the provisions on resort to the Court and to the arbitral tribunal provided for in article 58, paragraph 2, of the 1996 draft.

15. With regard to satisfaction, as regulated by new draft article 38, he welcomed the deletion of the reference to punishment of those responsible for the wrongful act, as such a measure was not confirmed by State practice. The same applied to the "punitive damages" regulated by former article 45.

16. With regard to countermeasures, the proposal contained in new draft articles 50 to 55 was generally positive in that it sought to strike a balance between the rights and interests of the injured State and those of the responsible State, provided, of course, that a dispute settlement mechanism was included in the draft. He welcomed the deletion of the provision in the 1996 draft referring, under "prohibited countermeasures", to "extreme economic or political coercion". While such a prohibition appeared to be justified where such measures were designed to endanger the territorial integrity of the State, it was covered by the principle of proportionality provided for in draft article 52.

17. Lastly, with regard to draft article 51, subparagraphs (a) and (b), he believed that the fundamental human rights and obligations of a humanitarian character referred to were those designed to protect the life and physical integrity of the human

person, in accordance with article 60, paragraph 5, of the 1969 Vienna Convention on the Law of Treaties.

18. **Mr. Leanza** (Italy) said that he welcomed the amendments to Part One of the draft articles and, in particular, to draft article 23. As for the reorganization of Part Two, it had clarified the distinction between the legal consequences arising from the perpetration of an internationally wrongful act and the various ways in which such consequences could be implemented or suspended. Moreover, since the focus of the draft articles was on the responsible State, it was logical for all provisions relating to the conduct of the injured State to be dealt with in a separate section.

19. It was appropriate to combine the closely related concepts of cessation and non-repetition in draft article 30. Assurances and guarantees of non-repetition could be indispensable under certain circumstances, including cases of wrongful acts involving the use of force; their exact form could be determined on the basis of international practice.

20. Draft articles 31 to 34 satisfactorily established that the responsible State was under an obligation to make full reparation, defined the concept of damage and stressed the need for a causal link between the wrongful act and the resulting injury. The concern expressed at the use of the words "full reparation" seemed excessive, since international jurisprudence ensured that all circumstances would be taken into account in any specific case. He agreed that the draft articles should not deal with the issue of identification of the responsible State, which was covered by primary rules.

21. Owing to the wide variety of special circumstances to be considered by judges in cases involving reparation for injury, it would be best to provide only general guidelines on the matter. There should be no mention of the injured State's right to reparation, but only of the responsible State's obligation in that regard; such an approach would obviate the need to determine which State or States had been directly or indirectly injured.

22. Further explanations could be relegated to the commentary; he endorsed the decision not to mention the political independence or economic stability of the responsible State as factors affecting the obligation of reparation, since such factors were difficult to assess and lent themselves to abuse; moreover, under international law, domestic circumstances did not affect a State's obligations under international agreements. Furthermore, it would be preferable not to mention the principle of proportionality in draft article 38 in order not to imply that it applied only in cases of satisfaction.

23. He reiterated his Government's support for a definition of international crimes as distinct from international delicts. International law had already established the existence of *erga omnes* obligations; the draft articles should codify the existing variations in concepts of responsibility in order to increase the effectiveness of response to specially serious wrongful acts and to prevent abuses. A regime of responsibility for wrongful acts affecting the fundamental interests of the international community would in no way constitute a criminal code similar to those provided for under national legal systems. However, in light of the need to ensure the Commission's adoption of all the draft articles, his Government was prepared to accept the compromise of deleting the word "crime" while maintaining in draft article 41 the essence of former article 19: the concept of an obligation owed to the international community as a whole and essential for the protection of its fundamental interests and the definition of a "serious" breach of such an obligation, which, by implication, did not include mere negligence on the part of the responsible State.

24. Draft article 42 also represented an acceptable compromise; in-depth discussion of the issue of consequences, which should not necessarily be limited to punitive damages, could be postponed to a later date.

25. Turning to Part Two bis, he said that it was logical to make a clear distinction between the injured State and other States that were entitled to invoke responsibility. On the basis of past experience with other codification conventions, he agreed with the Commission's decision to give States flexibility in the establishment of criteria and procedures. He also welcomed the stipulation in draft article 45 that local remedies must be exhausted and the absence of any mention of a statute of limitations in article 46.

26. The section on countermeasures, while clearly the result of a compromise, was preferable to the text adopted on first reading and included a number of limitations designed to prevent abuse. He welcomed the elimination of a distinction between obligations not subject to countermeasures and prohibited countermeasures; the mention of obligations of a humanitarian character, which were not limited to the

protection of human rights; and the treatment of the issue of proportionality.

27. With respect to draft article 53, he stressed that international jurisprudence had not established that countermeasures could not be resorted to until every effort had been made to achieve a negotiated solution; thus, there was nothing to prevents States from taking immediate countermeasures in emergency situations.

28. In the case of draft article 54, he was surprised at the proposal to allow third States to take countermeasures on behalf of the State injured by the breach rather than in cases where no State was the victim of the breach, as the Special Rapporteur had proposed. However, in light of the rapid developments in international law and in the interests of proportionality, he welcomed the flexibility of paragraph 3, which called on States to cooperate in the implementation of countermeasures.

29. In Part Four of the draft articles, he agreed with the decision not to include draft article B, which the Special Rapporteur had proposed in his third report on State responsibility (A/CN.4/507/Add.4, para. 429); the content of international obligations of a State was a complex issue and could not be covered in so brief a provision. It was also important to clarify draft article 56, on *lex specialis*, which, in its current form, would appear to preclude even residual application of the draft articles in cases where the special rules of international law proved inadequate; such a position would excessively restrict implementation of the new instrument.

30. **Ms. Mekhemar** (Egypt) said that the outstanding issues noted by the Special Rapporteur, members of the Commission and Governments were matters which had not been settled in general international law, which was undergoing rapid change. No complete and accurate picture could be drawn of the state of international law on any particular topic. For that reason the Commission, which had invested over 40 years in its study of the topic of State responsibility, should not rush into adopting a set of rules which might not seem appropriate in a few years' time.

31. She agreed with the Special Rapporteur that the provisions of Part Two of the draft were without prejudice to any rights arising from the commission of internationally wrongful acts by a State which accrued to any person other than the State. Concerning the distinction, if any, to be drawn between a State or a number of States specifically injured by an internationally wrongful act, and other States which had a legal interest in the performance of the relevant obligations, it must be made clear that an "injured" party was the one to whom an international obligation was due. Referring to the Advisory Opinion of the International Court of Justice on *Reparation for injuries suffered in the service of the United Nations*, and the work of Willem Riphagen as Special Rapporteur, she pointed out that although all other States might be affected by the breach of the obligation, having a legal interest in its performance, they were not necessarily "injured". She believed a right to an obligation and an interest in its performance were two different notions with different consequences. In turn, they had a bearing on the responsibility of the State, and on the right to remedies or countermeasures, whereby certain States might request rights to which they were not entitled under the present international legal system.

32. The Commission had done well in revising the concept of "crimes". However, the reference to "serious breaches of essential obligations to the international community as a whole" posed a fresh problem, because the definition of "serious breaches" in draft article 41 was obscure: what were the "fundamental interests" to be protected? She agreed with the Special Rapporteur that there was a need for further consideration of obligations owed *erga omnes*, which were referred to in a variety of ways in Part Two and Part Two bis of the draft. The concept of *jus cogens* was likewise interpreted and applied in different ways. Paragraph 1 of draft article 41 used both concepts, resulting in considerable uncertainty. Obligations owed *erga omnes* were defined as being "owed to the international community as a whole", which seemed to suggest that some countries would carry more weight than others. States had different political, social and economic backgrounds, and it was necessary to look to common denominators, not the aspirations of a self-appointed elite. The notion of "the international community of States as a whole" had first appeared in article 53 of the 1969 Vienna Convention, but had been accepted by States only because safeguards had been incorporated into article 66, providing for referral to the International Court of Justice in the event of a dispute as to its interpretation or application. Moreover, the notion had been intended to regulate a primary, not a secondary rule, and

required adaptation in order to fit into the structure of the present draft.

33. Careful consideration should be given to the limits and conditions placed on countermeasures, which were designed to control recourse to actions which would otherwise be prohibited. There was apparently no rule under existing customary law to require either that the existence of an internationally wrongful act should be determined by a third party before such recourse, or that prior negotiations should be entered into. In the *Air Services Agreement* case of 1978, the Arbitral Tribunal had found that international law did not prevent a party from resorting to countermeasures before exhausting dispute settlement procedures or during negotiations with the wrongdoer. There was also the question of how countermeasures should be terminated. If they took the form of terminating an obligation towards a defaulting State, the injured State should not be expected to fulfil an obligation which it had lawfully chosen to terminate rather than suspend.

34. The draft articles showed a close relationship in the draft between the law of treaties, especially Articles 60 and 73 of the 1969 Vienna Convention, and the law on State responsibility. The draft should not blur the distinction between them with regard to breaches of contractual obligations. However, a reference to the parallelism between the Convention and the draft articles should be maintained, perhaps through a "non-prejudice" clause.

35. As for the ultimate form of the draft articles, like many other delegations she did not favour adopting them in the form of a binding agreement, because the negotiations leading to its conclusion would enable the less scrupulous representatives to water it down so that no new obligations were imposed on their Governments. Other alternatives should be considered.

36. **Mr. Hussein** (Iraq) said that in his delegation's view, the provisions relating to countermeasures in draft article 50 were unsatisfactory in their current form, in that there was some risk that large States would be able to use them to serve their own interests. Any provisions on countermeasures must include adequate safeguards: the impact of the countermeasures on the responsible State should be taken into account; countermeasures should be taken only exceptionally; they should be commensurate with the injury suffered; and they should terminate with the cessation of the wrongful act. Moreover, countermeasures should not constitute an instrument of revenge or a means of interfering in the internal affairs of States or destabilizing them politically or economically. His delegation supported, in principle, draft article 51, especially paragraph 1 (a) to (e), article 52, and article 53.

37. Draft article 37, on compensation, required further clarification to bring the definition of compensation into line with the recognized principles of international law. His delegation reserved comment on draft article 38 for the moment, but would make its views known in writing in due course. Paragraph 3 of draft article 38, was particularly appropriate, stipulating as it did that satisfaction should not be out of proportion to the injury and might not take a form humiliating to the responsible State. Other limitations should be that compensation should not be so burdensome as to exceed the capacity of the responsible State, and that the basic needs and developmental requirements of that State and its people should be taken into account. Otherwise, measures taken to exact compensation might become an instrument of vengeance and punishment rather than a mechanism for strengthening the international rule of law and promoting stability in international relations.

38. It was to be hoped that it would be feasible to draft a comprehensive convention on State responsibility, one characterized by precision and clarity. Pending the drafting of such a convention, the General Assembly might adopt, by consensus, a declaration of principles in the matter.

39. **Ms. Steains** (Australia) expressed support for the Commission's treatment of former article 19, and the elimination of the distinction between "delictual" and "criminal" responsibility. She endorsed the new draft articles 41 and 42. The new chapter III successfully embodied the values underlying the former article 19, without referring to "crimes". However, she queried the nature of the "fundamental interests" referred to in paragraph 1 of draft article 41; were they any different from the "essential interest" mentioned in paragraph 1(b) of draft article 26? Furthermore, draft article 42, paragraph 2 (a) did not make clear whether implicit, as well as explicit, recognition was prohibited; and there was no reference in that paragraph to time-frames.

40. She welcomed the inclusion of a new draft article 39 on interest, reflecting the comments of her

delegation at the Committee's previous session. She also supported the new paragraph 2 of draft article 37, noting that the compensation specified would not cover purely environmental damage.

41. She accepted the reformulation, in the new draft articles 43 and 49, of the definition of an "injured State". The new articles drew an essential distinction between breaches of bilateral and of multilateral obligations, the latter including obligations towards the international community as a whole. However, the terms "collective interest" and "in the interest ... of the beneficiaries" in draft article 49 ought to be clarified in order to elucidate the scope of that article and of draft article 54, on countermeasures by States other than the injured State.

42. She queried the apparently open-ended link established in draft article 10 between the conduct of an insurrectional movement and the responsibility of a new State which emerged from it. It would be useful to specify the degree of proximity or the time-frame required for the conduct of an insurrectional movement that became the new Government of a State to be considered an act of that State.

43. Australia accepted the treatment of necessity in draft article 26; the scope of necessity precluding wrongfulness must be kept very limited, however, in order to avoid abuse. She therefore welcomed the strict conditions laid down in that article, and especially in paragraph 2 (a). It would be useful to clarify the phrase "essential interest", as compared with "fundamental interests" in draft article 41, and the nature and scope of the interests in question.

44. As for the final form of the draft articles, which made a major contribution to the law on State responsibility, the preliminary view of her delegation was that it should be a code or declaration, rather than a multilateral convention.

45. **Mr. Kanu** (Sierra Leone) welcomed the progress made on the topic, and the decision by the Special Rapporteur to revise the texts. Eliminating the distinction between criminal and delictual breaches of international obligations was also a welcome move; however, the controversy surrounding it had not been removed by concentrating instead on the obligations of States towards the international community as a whole. The new category of "serious breaches" bore the imprint of the former notion of an "international crime". Moreover, the notion of the international community as a whole was too vague. It might be preferable to use language similar to that in article 53 of the Vienna Convention on the Law of Treaties.

46. With regard to the content of the international responsibility of a State, he agreed with the Special Rapporteur that the requirement in draft article 30 (b) to provide assurances and guarantees of non-repetition touched upon the relationship between municipal and international law, because if the breach stemmed from a domestic law the requirement could be a means of compelling a State to amend or repeal it.

47. In draft article 31, "injury" was defined as any damage arising as a consequence of the wrongful act. However, full reparation was only possible where the damage could be clearly quantified, which would not normally be the case with internationally wrongful acts. The rule on reparation was inadequate, and should be revisited by the Commission.

48. The notion of the international community in draft article 42 was too vague; he would prefer a form of words such as in article 53 of the Vienna Convention on the Law of Treaties. Defined in a broad sense, the international community would encompass non-governmental organizations and individuals as well as States, and in view of the practice of humanitarian intervention, it would be appropriate to enable victims of human rights abuses to invoke State responsibility.

49. Without going so far as to insist on a definition, he believed the concept of the injured State in draft article 43 was obscure and required some sort of generic language. It had also to be decided what should be considered as obligations *erga omnes*. With regard to the view that such obligations bore upon fundamental human rights deriving from international law, he sympathized with those who had criticized the attempt to distinguish between fundamental human rights and other rights. To create a hierarchy among human rights would run counter to the Universal Declaration of Human Rights and the recent developments in human rights law. However, he agreed with the Special Rapporteur that not all human rights gave rise to obligations *erga omnes*, since the international community gave priority to civil and political rights over economic rights.

50. The requirement in draft article 44 for the injured State to give notice of its claim went too far and would not succeed. In paragraph 2 (b), extra language was needed to clarify the right of the injured State to

choose a form of reparation which would not impose a disproportionate burden on the other State.

51. Countermeasures should be regulated to ensure that they would not be used by powerful States as political weapons against weaker ones, especially developing countries. He was concerned that draft articles 50 to 55 failed to state clearly that countermeasures were only legitimate as between two States in a relative sense. The wording of article 50, paragraph 2, raised some difficulty. Conduct inconsistent with the provisions of a treaty, if justified as countermeasures, should not be considered such as to suspend the treaty itself. The treaty would continue to apply, and non-compliance with it could be accepted only for as long as the criteria for adopting countermeasures existed. He welcomed the limitations placed on countermeasures in draft articles 51 to 55. They must not be used as a form of retaliation, punishment or sanction.

52. He concluded by welcoming the inclusion of draft article 56 on *lex specialis*, which restated a well-established principle of international law.

53. **Mr. Szénási** (Hungary) said that he welcomed the decision of the Commission to submit the draft articles on State responsibility for consideration by the Sixth Committee before adoption by the Commission. His delegation was flexible with regard to the eventual form the text might take. It could support a code of State responsibility, similar to a convention in content but taking the form of a General Assembly declaration. A set of rules on State responsibility could represent a major breakthrough in the codification of international law, even without the force of a legally binding instrument.

54. As for specific draft articles, he supported the new wording of article 31, which made it possible to claim reparation for moral as well as material injury. He also supported the new wording of article 33, which made reference to applicable rules of international law other than the draft articles. The new article 37 provided for full compensation including the loss of profits, an issue to which he attached special importance. Article 38, providing satisfaction for injuries which could not be made good by restitution or compensation, was the natural outgrowth of article 31. The list of the forms that satisfaction might take was non-exhaustive, leaving open the possibility that other forms of satisfaction might be devised as the case required. His delegation joined with others that had expressed their concerns about the possible inclusion of punitive damages.

55. Concerning contributory negligence, he agreed with the general thrust of article 40. While noting the view that the obligation of the injured State to mitigate the damage was not clearly supported by international law, he felt that the issue could only be decided on a case-by-case basis. A decision as to whether the contribution to the damage was the result of a negligent or a wilful action would depend on the circumstances and on the applicable legal instruments, some of which touched upon the issue of mitigation of damage. His delegation awaited the promised commentary with great interest.

56. Chapter III of Part Two of the draft articles, concerning serious breaches of essential obligations to the international community, should be retained; however, further refinement of the chapter and related articles was necessary. A clear definition of the breaches involved, a restrictive definition of the injured State, specific rules on how responsibility could be invoked, strong safeguards against the unlawful use of countermeasures and a clear enumeration of their limits would enable the international community to reach consensus on the issue.

57. The issue of countermeasures remained sensitive owing to their potential for abuse. The crucial point to bear in mind was that countermeasures must be proportionate to the injury suffered. The aim of countermeasures was to induce law-abiding behaviour on the part of the responsible State. That did not imply that the injured State could use any and all measures to induce such behaviour; it simply meant that countermeasures aimed at the attainment of any other goal were by definition unlawful. Moreover, countermeasures should be calibrated to avoid irreversible consequences, and a provision to that effect should be included in article 50. He fully agreed with the general thrust of article 51 on obligations not subject to countermeasures, although the text required some refinement.

58. Article 53 on conditions relating to resort to countermeasures also required refinement. Although the current wording of paragraph 3 made it clear that an injured State might resort to provisional and urgent countermeasures only in order to preserve its rights, there was no explanation of why such measures were

more provisional than other countermeasures, and no special rules were provided for their application. In addition, further light should be shed on the relationship between countermeasures and ongoing negotiations, an issue that could be revisited in connection with dispute settlement provisions.

59. The elaboration of an effective dispute settlement mechanism was a necessity for the proper functioning of a legal regime on State responsibility. He accepted the Commission's recommendation that dispute settlement should be considered after the adoption of the rest of the draft articles. However, he was convinced that a set of dispute settlement rules would have merit even if the text did not take the form of a legally binding convention.

60. **Mr. Varšo** (Slovakia) said that after almost 50 years of work on the topic the Commission and the Committee did not yet have a comprehensible and understandable set of draft articles on State responsibility, and it had even been questioned whether large segments of the draft articles such as those on countermeasures and settlement of disputes should be included. The architecture of Roman law might be helpful in clarifying the structure of the draft articles. First, the draft articles should be reviewed and the rules categorized as substantive rules, dealing with the substantive rights of subjects of law and their conduct in relation to one another, or procedural rules, intended to ensure the application of the substantive rules.

61. The substantive rules need not be numerous. They could be rationalized around the principle of *pacta sunt servanda*. As a minimum, the substantive rules should stipulate that a wrongful act must cease and the damage caused by the act must be repaired. In addition, the possibility of proportional countermeasures should be allowed in order to induce a wrongdoing State to comply with its international commitments. The draft articles on cessation and non-repetition, restitution, compensation and satisfaction, together with some of the draft articles on countermeasures, should form a good basis for the elaboration of the substantive rules. The question of whether or not to include articles on settlement of disputes as one of the obligations in the State responsibility regime would need to be studied carefully, particularly as it related to countermeasures. Overall, a general, simple and clear articulation should be preferred to a detailed elaboration which might give rise to controversy.

62. The procedural rules must make it clear who was entitled to declare the act of a State wrongful and under what circumstances. Most of those rules were contained in article 46 ter (Invocation of responsibility by an injured State), article 46 quater (Loss of the right to invoke responsibility) and article 46 quinquies (Plurality of injured States) proposed by the Special Rapporteur at the fifty-second session of the Commission; they needed clarification, however, particularly with respect to an obligation *erga omnes*. The starting assumption should be that the injured State was most aware which norms had been breached and which rights had been violated by a responsible State. The procedural rules must then deal with the sensitive matter of the invocation of State responsibility and the procedures for applying the rules of cessation, reparation and countermeasures. The procedures must take into account that the responsible State and the injured State were not in the same position and that the objective was to induce a responsible State to comply with its international obligations.

63. Among the more controversial questions was whether or not to include articles referring to the primary responsibility of a State or to limit the draft articles to situations related to secondary responsibility. Determining secondary responsibility, however, required identifying which norms of primary responsibility had been violated. The interrelationship between the two types of responsibility led to the conclusion that the draft articles must have a basis in the principle of *pacta sunt servanda*. States must be aware that the principle mission of international law was to promote respect for international obligations.

64. Moreover, a general reference to that principle could avoid the need to make qualitative distinctions between international norms or to define controversial legal categories such as the "crime" or "delict" of a State. In addition, reference to the principle of *pacta sunt servanda* would have practical implications in three other areas: identifying the norm breached by a State; determining adequate and proportional countermeasures; and determining appropriate reparation to an injured State.

65. Procedural rules would have to deal with two key questions: who was authorized to decide that an international obligation had been breached and who was authorized to invoke State responsibility in the case of a breach? Those two decisions might not be difficult in the case of a breach of a bilateral agreement

but became more complex in the case of a breach of a multilateral obligation or an obligation *erga omnes*.

66. Countermeasures, another controversial issue, represented a necessary element within a regime of State responsibility as a legal means for inducing a wrongdoing State to change its behaviour. However, the articles on countermeasures must be drafted carefully to avoid abuses.

67. Although he would prefer that the draft articles on State responsibility should take the form of a convention, he was confident that, whatever form they took, they would serve as a practical guide to States and have a positive legal impact on the stability of the international order.

68. **Ms. Alejbeg** (Croatia) said that the adoption of the draft articles in the form of a convention should provide an appropriate legal framework for the strengthening of State responsibility in respect of international obligations.

69. With regard to the new structure of Part Two, Chapter I, she supported the proposed revisions, especially the inclusion of the cessation and non-repetition provision, as well as the obligation to make reparations, one of the general principles governing the international responsibility of States. While it was understandable that some might have second thoughts about the term "full reparation", given that reparation was often unable to make up fully for the consequences of the wrongful act, the concept of "full reparation" in principle expressed the only just way of remedying the damage caused. While draft article 31, paragraph 1, was generally acceptable, it should be rephrased for consistency with draft article 30 as follows: "The State responsible for the internationally wrongful act is under an obligation to make full reparation for the injury caused by that act."

70. She also supported the proposal to delete paragraph 4 of former article 42, given the general provision on the irrelevancy of internal law contained in new draft article 3. Since the relevancy of internal law was a general principle applicable to the whole of the draft articles, it should be placed in Part One, Chapter I.

71. She was also inclined to support the proposal to extend draft article 3 to make it unequivocally applicable to all cases. In that context, the provision concerning the general irrelevancy of internal law could be incorporated into a new paragraph 2 of draft article 3, in order to make international law universally applicable to all situations involving State responsibility. Accordingly, she suggested that the title of article 3 should be amended as follows: "Law applicable for characterization of an act of a State as internationally wrongful", or simply "The applicable law".

72. With regard to countermeasures, she welcomed the concept put forward by the Special Rapporteur, namely, that countermeasures should consist of the suspension by the injured State of the performance of an obligation towards the responsible State with the intention of inducing the latter to comply with its obligations of cessation and reparation. However, the fundamental precondition for taking countermeasures should be borne in mind, namely, being certain that an internationally wrongful act had indeed occurred. It was questionable whether it was justified in all cases to rely on the assessment by the injured State, which could be subjective, particularly with regard to the circumstances referred to in article 53, paragraphs 2, 3 and 4.

73. She welcomed the inclusion of Part Four in its proposed version, and supported the proposal by the Special Rapporteur on non-inclusion of the saving clause on diplomatic immunity, pending a consensus on its wording.

The meeting rose at 12.20 p.m.

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Chairman: Mr. Politi ..... (Italy)

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00-70929 (E)

The meeting was called to order at 10.15 a.m.

Statement by the President of the International Court of Justice

1. **Mr. Guillaume** (President of the International Court of Justice) said that he wished to draw the Committee's attention to a phenomenon of considerable concern to academics and legal practitioners: the proliferation of international judicial bodies and the impact of that proliferation on international law.

2. The Permanent Court of International Justice, created in 1920, had long been the only player on the international judicial stage. Its replacement by the International Court of Justice had more or less coincided with the development of other judicial forums, initially at regional, then at global level. The European Court of Human Rights had been established in 1950, the European Court of Justice in 1957 and the Inter-American Court of Human Rights in 1981. Over the past two decades still more courts had come into being. The International Tribunal for the Law of the Sea had become operational in 1996, as a result of the United Nations Convention on the Law of the Sea of 1982. In 1994 the Marrakesh Agreement establishing the World Trade Organization had provided for that body's quasi-judicial dispute settlement mechanism. Agreements currently undergoing ratification would in due course lead to the creation of an African Court of Human Rights and the International Criminal Court. A number of ad hoc tribunals had also been established, such as the Iran-United States Claims Tribunal or the International Criminal Tribunals for the former Yugoslavia and Rwanda.

3. Such a multiplication of international judicial bodies had to be viewed in the context of more far-reaching changes in international relations. The way in which States related to one another had expanded and diversified: they cooperated in such fields as security, education, economics, the environment, scientific research, communications and transport. Non-State players — commercial companies, non-governmental organizations and private individuals — also increasingly engaged in transnational activities, which themselves had become more diverse, following a trend that technological advances, for example in the field of telecommunications, would undoubtedly intensify. It was essential to make such activities subject to the rule of law, and thus the proliferation of courts could be perceived as a process of adaptation to fundamental changes.

4. International law had itself become more complex and diverse. Human rights, environmental law, economic law, the law of the sea or space law were all sometimes regarded as specialized branches of international law. At the same time, the need for certain types of inter-State disputes to be adjudicated by bodies sensitive to specific local conditions had led to the creation of regional tribunals. Although such tribunals were not designed with some of the new categories of player in mind, there was growing pressure on those players to participate in the judicial process. The pressure had not been without consequences in the economic field, as could be seen from the constitution of the Court of Justice of the European Communities or the decisions in which the body responsible for settling World Trade Organization disputes had recently accepted the intervention of a non-governmental organization as *amicus curiae*. The same had occurred in the human rights field. Natural persons, non-governmental organizations or groups of individuals could bring cases before the European Court of Justice.

5. It might appear that the proliferation of judicial bodies responded to recent developments in the international community; but it had been attended with unfortunate, possibly far-reaching consequences for the operation of international law, in terms of both procedure and content. First, jurisdictions increasingly overlapped. Even in the first half of the twentieth century, States had had the option of going to arbitration or taking their case to the Permanent Court of International Justice. The proliferation of courts had created a whole range of other possibilities and opened the way to a form of inter-institutional "competition". Thus the International Tribunal for the Law of the Sea could, under articles 287 and 288 of the Convention, be given jurisdiction to hear cases relating to the application of the Convention, even though the International Court of Justice also had jurisdiction in that area. Indeed, States had traditionally brought maritime disputes to the Court. A similar overlap had occurred in other areas of international law, with two main consequences: "forum shopping" and a problem with conflicting decisions.

6. The existence of several forums which could declare themselves competent to hear a particular

dispute enabled the parties — usually the applicant, acting unilaterally — to select the forum which best suited them, taking into account such considerations as access, the procedures followed, the court's composition, its case law and its power to make certain types of order. For example, it was entirely possible that in the *Blue Fin Tuna* case the applicant had chosen the International Tribunal for the Law of the Sea because he sought readily enforceable measures. In that context, it should be noted that the provisional measures granted by the Tribunal had subsequently been revoked by the arbitral tribunal to which the dispute had been referred. "Forum shopping" might foster the spirit of competition between courts and stimulate their imagination, but there were also negative consequences. The choice of court might, for example, be motivated by the fact that the case law of a particular court happened to be more favourable to certain doctrines, concepts or interests than that of another. Moreover, since every judicial body tended — consciously or not — to assess its value by reference to the frequency with which it was seized, courts could be tempted to tailor their decisions to ensuring an increased caseload, to the detriment of a more objective approach to justice. Such a development would be profoundly damaging.

7. A second worrying consequence of overlapping jurisdictions was that they increased the risk of conflicting judgements. Systems of national law, which had long had to deal with the problem, had solved it by two methods: by developing a clear hierarchy among the courts and by formulating rules on pendency and *res judicata*. The international system lacked such devices. International courts should therefore coordinate the exercise of their individual jurisdiction in cases where more than one court considered itself competent to hear a dispute. Such coordination depended greatly on the attitude of the judges and on their ability to determine their own competence while bearing in mind their position within the international framework. For example, the International Tribunal for the Former Yugoslavia had ruled on the legality of its own establishment. It would hardly have ruled against itself, however, and it might have been more appropriate for it to have asked the Security Council to seek an advisory opinion from the International Criminal Court. More generally, in a case where two courts, both fully competent, were seized of the same dispute, one of them should surely withdraw. That, however, gave rise to the question of the criteria for such a choice. Sometimes an overlap involved only one of the issues in dispute, for example. Above all, it was important to ensure coherence in relation to *res judicata* as between different forums so as to guarantee the integrity of the decisions rendered.

8. Although the proliferation of courts had led to a larger number of cases coming before the courts, thus contributing to the development and enrichment of international law, there was also a serious risk of inconsistency within the case law. The courts had, admittedly, shown themselves anxious to avoid such inconsistency. Thus the International Court of Justice kept track of the judgements rendered by other courts and increasingly referred to them. In all, some 15 judgements of the Court contained such references. For example, in the *Land, Island and Maritime Frontier Dispute* between El Salvador and Honduras, the Court had in 1992 referred to a 1917 judgement of the Central American Court of Justice. In 1993, in the case concerning *Maritime Delimitation in the Area between Greenland and Jan Mayen*, the Court had analysed an award handed down in 1977 by the Anglo-French Arbitral Tribunal regarding the *Mer d'Iroise* case, adopting the award's reasoning. More recently, in the *Kasikili/Sedudu Island* case between Botswana and Namibia, the Court had found support for its decision in the arbitral award rendered in the *Laguna del Desierto* case between Chile and Argentina.

9. By the same token, certain specialized courts had frequently drawn on the jurisprudence of the Court or its predecessor. The Inter-American Court of Human Rights had quoted abundantly from the *Chorzów Factory*, *"Lotus"* and *Corfu Channel* cases, while the International Tribunal for the Former Yugoslavia had made a number of references to the Court's decision in the *Barcelona Traction* case. The body responsible for settling disputes of the World Trade Organization had made frequent reference to the Court's case law. Thus, in its recent decision on *European Community measures concerning Meat and Meat Products (Hormones)*, it had taken account of the Court's findings in the *Gabčikovo-Nagymaros Project* case between Hungary and Slovakia regarding the existence of the precautionary principle. The Iran-United States Claims Tribunal had also relied on the Court's jurisprudence to a considerable degree.

10. The risk of inconsistency nonetheless remained substantial. In academic circles, there had been a lengthy debate as to whether or not the Chambers of

the International Court of Justice, whose composition could vary according to the wishes of the parties, were at risk of developing their own separate case law, with potentially chaotic results. That issue had virtually ceased to be of concern, with States tending to prefer to have their cases heard by the full Court. In any case, separate courts having to apply the same rules of law ran a far greater risk of a conflict of case law than separate entities established within the same forum.

11. Such conflicts were particularly likely to occur in specialized courts, which were inclined to favour their own disciplines. For example, in the case of *Loizidou v. Turkey*, the European Court of Human Rights had taken a position different from that of the International Court of Justice on the question of territorial reservations in declarations of compulsory jurisdiction. The International Court, like its predecessor, had consistently held that such reservations were legal and must be upheld, whereas the European Court had adopted a different solution. Admittedly, the latter's decision could be regarded as an instance of *lex specialis*, being founded on the specific characteristics of the system of the European Convention on Human Rights. It did, however, diverge from the case law of the International Court in its reference to the Vienna Convention on the Law of Treaties.

12. Still more to the point, the International Tribunal for the Former Yugoslavia, in rendering its judgement on the merits in the case of *Prosecutor v. Dusko Tadic* in July 1999, had expressly criticized and declined to follow a decision of the International Court of Justice. In order to determine its competence, the Tribunal had had to establish that there was an international armed conflict in Bosnia and Herzegovina by showing that certain of the participants in the internal conflict were acting under the control of a foreign Power, namely Yugoslavia.

13. In its analysis of the question, the Tribunal had referred to but not followed the Court's decision in the case concerning *Military and Paramilitary Activities in and against Nicaragua*. In that case, the Court's test of whether the United States of America had effectively controlled the activities of the *contras* had been rejected by the Tribunal, which had adopted a new interpretation of international law on State responsibility. It had opted for a less strict criterion in relation to the imputation of responsibility, holding that, in the case of organized groups of combatants, it was sufficient to demonstrate that the groups as a whole were under the overall control of a foreign State. That criterion made the State responsible for the group's activities, according to the Tribunal, irrespective of whether each individual act had been specifically imposed, requested or directed by the State in question.

14. Those examples showed that the growing specialization of international courts carried with it the serious risk that the overall perspective would be lost. Certainly, international law must adapt itself to prevailing circumstances, as national law had always done, and to local and regional requirements. Nonetheless, it should preserve its unity. The question was therefore how the proliferation of courts could be a source of enrichment rather than anarchy.

15. First of all, before a new court was created, consideration should be given to whether the functions could not be carried out by an existing body, as had happened with the Administrative Tribunals of the United Nations and the International Labour Organization. There was also the question of how to deal, within the current system, with the absence of a structured relationship between the various courts: whether it should be left to the wisdom of the judges or whether some form of structural change should be undertaken. As a judge himself, he would wish to be able to leave it to the wisdom of judges, who should be aware of the dangers of legal fragmentation and of inconsistency in case law. Such a minimalist solution was not, however, sufficient. Every institution had a tendency to go its own way. What was needed, therefore, was to institutionalize relations between the various courts.

16. The International Court of Justice remained the principal judicial organ of the United Nations and the only court with a universal, general jurisdiction; moreover, its age endowed it with special authority. The mechanisms to enable the Court to assume that role, however, remained extremely limited. Thus, although it could act as a court of appeal from the decisions of the Council of the International Civil Aviation Organization, that procedure was very seldom used. Moreover, its power of review over the decisions of international administrative tribunals had also recently been restricted. Indeed, the possibility of seeking an advisory opinion from the Court was currently restricted to certain bodies and specialized agencies of the United Nations. Perhaps its powers had been limited too far.

17. It had been suggested that the Court should be entrusted with the task of acting as a court of appeal or review from judgements rendered by other international courts. That would, however, require a strong political will on the part of States and far-reaching changes in the Court, which would need to be given substantial resources. It was doubtful whether such a will existed. An alternative solution put forward by the President of the International Court in his address to the General Assembly in 1999 was that, in order to reduce the possibility of conflicting interpretations of international law, other international courts should be encouraged to seek the Court's opinion on doubtful or important points of general international law raised in cases before them. Such a procedure existed in European Community law under article 234 of the Treaty of Rome (formerly article 177), enabling — and sometimes requiring — national courts of member States of the European Union to refer preliminary questions to the European Court of Justice. The unity of Community law was thus assured.

18. A comparable procedure could be used in general international law. Since the International Court was competent to hear requests for advisory opinions from the Security Council and the General Assembly, it would be possible for international courts which were organs of the United Nations to ask the Security Council to seek advisory opinions on their behalf from the Court. The same solution could be adopted with regard to international courts which were not organs of the United Nations, such as the International Tribunal for the Law of the Sea or the future International Criminal Court. The Council of the League of Nations had sought opinions from the Court on behalf of other international bodies, even though the Covenant of the League of Nations had made no provision for such a practice. It was open to the General Assembly to act likewise on behalf of various judicial bodies.

19. John Donne had said: "No man is an island, entire of itself". The image was apposite for the current position of international law. Every international judicial body should become aware that it was but part of a whole and never an end in itself. The relative positions of new judicial bodies must be determined and new links between them established if the law was to remain coherent and to continue to operate to the benefit of all members of the international community.

20. **Mr. Leanza** (Italy) said that the President of the International Court of Justice had rightly stressed the risks of conflicts of jurisdiction resulting from the multiplicity of international judicial bodies. While a more structured dialogue among the different international tribunals would be helpful, it was difficult to envisage mechanisms for enhancing that dialogue. A balance must be found between the need for coherence in judgements and the need to safeguard the independence of the various tribunals. In particular, he would be grateful for clarification of whether the mechanism of requesting an advisory opinion from the Court through the Security Council or the General Assembly might not entail the risk of political control over the international judicial bodies, since the Council and the Assembly would always be free to decide whether or not to request the said opinion.

21. **Mr. Rao** (India) said that the various tribunals had been set up under different treaties to which different States were parties. What was done could not be undone. It had been suggested that judicial links should be established between the tribunals in order to avoid overlapping and to ensure review at higher levels, but it was difficult to see how that could be accomplished, given that not all States appointed representatives to the same bodies.

22. **Mr. Kamto** (Cameroon) said that during the last decade of the twentieth century, the Court had undoubtedly acquired an unprecedented degree of credibility and authority. The surge in its caseload clearly reflected that.

23. The diverse geographic origins of the parties showed that the Court had been able to inspire greater confidence among the States under its jurisdiction and to dispel the suspicions that had clouded its image following the judgements rendered in the *South West Africa* cases in 1966. Nearly all its decisions were models of clarity and precision, as well as outstanding contributions to the science of international law.

24. Nevertheless, justice delayed was justice denied. The delay in settling certain disputes that were before the Court rendered some situations irreversible and allowed others to deteriorate. That was particularly true of disputes involving armed conflict.

25. On various occasions the successive Presidents of the Court had indicated that the procedural delays were as much the fault of the parties as of the Court itself. The Court made constant efforts to improve its working methods in order to save time, and it called on the parties to do likewise. However, States parties to a

proceeding before the Court would certainly await the final decision with greater patience if the provisional measures ordered by the Court were binding on the parties and could therefore be implemented effectively on the ground.

26. He was aware of the difficulties which the Court faced in carrying out its work. The President had reviewed them in detail on other occasions, citing figures. There was a huge gap between the work that States expected the Court to perform and the modest resources at its disposal. He hoped that the Court would be provided with the material and financial means that it required in order to fulfil its mandate under the Charter of the United Nations.

27. That would not, however, solve the problem of the legal force of the provisional measures ordered by the Court. The Court itself had refrained from giving a clear answer on the subject, and legal opinion was divided. He failed to understand, however, how parties to a proceeding could commit their energies and resources, either to support the declaration of such measures or to combat them, if they would have no legal effect or practical consequences. Nor, under those circumstances, did it make sense for the Court to be required to suspend its consideration of all other cases in order to consider requests for the declaration of such measures. It was difficult to explain how the orders of the principal judicial body of the United Nations, which had a mandate to contribute to the maintenance of peace through law, were nothing more than non-binding requests, since there could be no resort to Article 94 of the Charter to enforce them.

28. The President of the Court had correctly stressed the risk of conflicts of international jurisdiction resulting from the proliferation of tribunals. He wondered, however, whether it might not be appropriate to compare the working methods and rules of procedure of the various judicial bodies. The International Court of Justice was the only international tribunal in which the notion of urgency that justified the declaration of provisional measures had no meaning. Even in the International Tribunal of the Law of the Sea, summary judgements were imposed on the parties. Consideration should be given to that issue if and when the Statute of the Court was revised.

29. **Mr. Wood** (United Kingdom) said that it was important not to exaggerate the difficulties arising from the multiplicity of international courts, which in his view were more potential than actual. A more serious problem was forum shopping and the possibility that aspects of the same dispute might be heard before different tribunals. When suggestions were made for new international bodies, consideration should be given to whether they were necessary. In addition, greater confidence should be placed in the wisdom of judges.

30. He shared the concern of the President of the Court at the possibility that specialization might lead to a lack of regard for the basic principles of international law. There were more and more specialists who did not have a deep background in public international law.

31. It was unclear whether it was realistic to expect other tribunals to suspend proceedings and refer questions to an international court. Such a mechanism was likely to be used only on a very exceptional basis.

32. **Mr. Ekedede** (Nigeria) said that he would appreciate clarification of whether the International Criminal Tribunal for Rwanda and the International Tribunal for the Former Yugoslavia, as well as the International Criminal Court, once it was established, might be allowed to refer cases to the International Court of Justice, acting as an appellate jurisdiction, and whether that would involve amending the Court's Statute.

33. Further details should also be provided on why the Court conducted its business only in English and French, since the United Nations had six official languages.

34. **Mr. Tomka** (Slovakia) read out article 6 of the draft articles on State responsibility submitted by the International Law Commission (A/55/10, chap. IV), which provided that the conduct of a person or group of persons should be considered an act of the State if the person or group of persons was acting on the direction or control of the State. The text did not refer to "effective control" or "general control"; however, the International Court of Justice had used the term "effective control" in its judgement in *Nicaragua v. United States of America*, while the International Tribunal for the Former Yugoslavia had, in its recent jurisprudence, referred to "general control". Perhaps the Special Rapporteur could state his views in the matter. It would also be helpful if he would clarify the Court's practice of deciding cases without taking a position on all the legal arguments invoked by the parties.

35. **Mr. Kanu** (Sierra Leone) said that his delegation would support any demand for increased resources for the Court.

36. It had been his understanding that since the Court was the principal judicial body of the United Nations, its judgements and orders were binding on all other judicial bodies. It appeared, however, that that was not the case. Further information would be appreciated.

37. **Mr. Abdalla** (Sudan) agreed that, with the proliferation of international courts, there was a real danger of several courts hearing the same case. Not only would that obscure the necessary clarity of law, but it would divert resources from the already restricted budget of the International Court of Justice. It was a question of political will. Those States which ignored the Court and took their cases to other courts did so for political reasons.

38. **Mr. Guillaume** (President of the International Court of Justice), replying to the points raised, said that the Court's official languages, French and English, were those laid down in Article 39 of its Statute, which was an integral part of the Charter of the United Nations. However, the Court was aware that its work should be widely known, and for that reason its "blue book", giving an account of its functioning and case law, was published in all the official languages of the United Nations. The Court's Internet site included some material in Spanish. The Court could also, under its Statute, authorize the use of a language other than French and English, and would do so at the request of a party provided that party provided the necessary translation and interpretation services. In 1923 the Permanent Court of International Justice had permitted Germany to use German in the *Wimbledon* case, and more recently the present Court had permitted the use of Spanish by Spain in the *Barcelona Traction* case.

39. The representative of Cameroon had mentioned the provisional measures contemplated in Article 41 of the Statute. The question whether such measures were binding had not yet been finally settled but soon might be, because it had been raised in a pending case between Germany and the United States of America.

40. As to whether the Court's authority would be enhanced if it were to deal more fully with the arguments raised by the parties to cases before it, instead of basing its judgements on its own reasoning, it was normal practice for courts to decide only those issues pertinent to a dispute. Moreover, focusing on those issues made it easier to reach a unanimous and reasoned conclusion. For instance, in the *Territorial Dispute* case between Chad and Libya the Court had found, in a judgement of only 32 pages, that the disputed frontier had been fixed in a treaty between France and Libya. The memorials filed in that case ran to 25 volumes. The Court's decision, which was virtually unanimous, had been executed within three months, under the supervision of the Security Council. If it had entered into the history of the matter prior to the conclusion of the treaty in question, such unanimity and speed of execution could hardly have been achieved. The Court had to strike a balance between developing international law and deciding the cases before it.

41. Turning to the question of the Court's authority in relation to other international courts, he said the very multiplicity of those courts was the nub of the problem. There was a positive benefit, in that the law could be developed in a variety of ways. However, the negative side was that the jurisprudence could also vary unaccountably, and in the case of the tribunal for the former Yugoslavia, the difference had been an actual discrepancy with the established case law of the Court. His own preferred solution to that problem had already been given; naturally, it raised problems of its own. The representative of Italy had queried whether the use of the advisory opinion procedure by other international courts would restrict their independence. If that were the solution adopted, the procedure would have to be laid down in advance, and neither the Security Council nor the General Assembly would have any authority to alter the question put by the applicant courts. In any event, the advisory opinion procedure was only intended for exceptional circumstances. It certainly did not appear at present that any other solution was forthcoming to the problem of conflicting jurisprudence.

42. Concerning the question raised by the representative of India, it was for States to effect the proper linkages among the different jurisdictions, not an easy matter since not all States were bound by the same treaties. It was a question of political will on their part.

43. As for the question raised by the representative of Sierra Leone, according to Article 59 of its Statute the Court's decisions had no binding force except between the parties and in respect of a particular case, although the *res judicata* did bind intervening States where the

case turned upon the interpretation of a treaty. However, the reasoning of the Court's decisions wielded considerable moral authority, and he hoped other international courts took due account of it. That did not mean that he was looking for the Court to become an appellate jurisdiction, which would require thoroughgoing changes in the present system.

Agenda item 159: Report of the International Law Commission on the work of its fifty-second session (*continued*) (A/55/10)

44. **Mr. Troncoso** (Chile), commenting on chapter IV of the report, said there should now be a combined effort to achieve consensus on the draft articles on State responsibility, in the form of a draft convention. A treaty would be binding and would offer maximum legal certainty. Moreover, to be fully effective many of the mechanisms and institutions envisaged in the draft articles would have to be laid down in treaty form. However, he urged a flexible approach and did not exclude the possibility of the draft articles being provisionally adopted by a resolution of the General Assembly, thus providing some guidance to States and to the International Court of Justice and other international tribunals. A solution along those lines should be regarded as a starting point for eventual codification of the topic in the form of a treaty.

45. On the question of obligations *erga omnes*, his delegation would have preferred to maintain the distinction between international delicts and international crimes, which was a valuable contribution to the development of international law. However, in order to achieve consensus it had been appropriate to delete the former draft article 19 and replace it by a new draft article 42 on the consequences of breaches of obligations towards the international community as a whole. That concept had arisen in international law in conjunction with the development of the concept of peremptory norms of general international law or *jus cogens*, culminating in the adoption of articles 53 and 64 of the Vienna Convention on the Law of Treaties. In the *Barcelona Traction* case, the International Court of Justice had distinguished such obligations from those stemming from a relationship with other States in the context of diplomatic protection. The concept of "the international community of States as a whole" should be retained, in order to exclude international organizations and other international actors, such as non-governmental organizations and even individuals. At the same time, the concept of the international community of States appeared to be less exacting than that of "all States", because the obligations towards the former should not necessarily be regarded as peremptory norms for each State individually, provided they were recognized by a broad majority. That ensured that the veto of a minority could not prevent the obligations from arising.

46. Reference should also be made to the other side of the coin of obligations *erga omnes*, namely, the concept of *actio popularis* by States. A consequence of breaching obligations of that kind was that responsibility could be invoked by any State member of the international community, whether or not it was a direct victim of the wrongful act, and that was a development which his delegation would like to see.

47. With regard to the settlement of disputes, a distinction should be drawn between disputes governed by the ordinary rules applicable to an internationally wrongful act entailing State responsibility, and disputes arising from the application or interpretation of rules in any future Convention. The former, in his view, lay outside the scope of State responsibility and were governed by general international law; they should not be covered in the draft articles except in respect of countermeasures. The latter should be covered by a provision for the settlement of disputes arising from the interpretation or application of a future Convention.

48. The limitations now placed in the draft articles on countermeasures seemed appropriate in light of the decentralized character of international society and the power relationships among States. However, countermeasures were effective instruments of law, and the restrictions should not be such as to deprive them of their usefulness. Such measures would not be admissible in the case of regimes which incorporated established mechanisms to be brought into play if their provisions were violated. Where more than one State was entitled to use countermeasures, it was necessary to decide whether the concept of proportionality applied to the measures employed by each State separately against the violator, or to all the countermeasures taken together. Draft article 54 appeared to opt for the latter solution, but the principle should be expressed more clearly in order to avoid future problems of interpretation of what was an extremely significant rule.

49. He endorsed the content of draft article 51. It had been said that in the event of countermeasures derogations would be possible from certain human rights. That was correct, but the draft article also indicated that human rights, even those which were derogable in extreme situations, could not be infringed by way of countermeasures. It would be desirable to include among the obligations which could not be affected by countermeasures those which prohibited the use of extreme political or economic measures such as to endanger the survival of a State.

50. With regard to draft article 53, paragraph 2, he did not believe that the wronged State necessarily had to offer to negotiate in all instances. In very serious cases, such as grave and systematic breaches of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, there might be little room for negotiations, the only licit alternative being a complete cessation of the behaviour in question. Generally speaking, it would be better to place the duty to negotiate on the perpetrator rather than the victim. Finally, he felt a distinction could usefully be drawn between the countermeasures which a State was empowered to adopt because of a wrongful act of another State, and those based on a wrongful act arising from failure by the other State to comply with a decision of an international court. In the former case, the appraisal of the act was made unilaterally; in the latter case, the unfulfilled obligation emanated from a third, impartial source which the disputing parties had undertaken to respect.

51. Turning to the question of diplomatic protection, in chapter V of the report, he said the topic should remain part of general international law, despite the growing capacity of individuals to enforce their rights, such as human rights and the protection of investments, at the international level. There were still cases in which individuals had to have recourse to their own States, rather than international bodies, for the protection of their rights. The rule laid down in the *Nottebohm* case, that there must for that purpose be a genuine and effective link between the individual and the State, should not be understood in absolute terms. Proof of an effective link should normally be deemed sufficient for the purposes of diplomatic protection if the juridical link of nationality reflected a genuine connection with the State seeking to exercise the protection. Thus the rule would be satisfied if an individual had the nationality of the State in question, and proof need only be furnished if, in the event of naturalization or dual nationality, the State from which protection was sought had objected.

52. With respect to whether a State could exercise diplomatic protection on behalf of one of its nationals who maintained an effective link with that State while maintaining weaker links with another State of which the person was also a national, that situation met the requirement that the person must have an effective link with the State exercising diplomatic protection, as well as the criterion of stronger de facto linkage. Thus, the weaker link that such a person might have with another State was insufficient for the exercise, by that State, of diplomatic protection, and therefore would not result in a situation where more than one State could exercise such protection on behalf of the same person. With respect to whether a State could protect one of its nationals with dual nationality against a third State of which the injured person was not a national, without having to prove that there was an effective link between it and that person, it should be assumed, in principle, that either of the two States of nationality could exercise such protection without having to prove such linkage. Such an assumption could be rebutted, but only when the third State impugned the existence of an effective link between the person and the State exercising diplomatic protection.

53. With respect to draft article 8, he said that diplomatic protection of stateless persons was justified in view of the latter's precarious legal situation. Therefore, such a rule was appropriate, provided that the person in question not only was ordinarily a legal resident of the State exercising protection but also had other genuine links with that State, such as those concerning his or her family ties, centre of interests and professional activities. Similar provision should be made for refugees, since they could not expect protection from the State from which they had fled owing to justified fears of persecution.

54. He doubted whether draft article 2 was relevant to the issue of diplomatic protection. The content of that article should be dealt with in relation to humanitarian intervention. His delegation was interested in the conduct of a study on the subject, which was being considered in other United Nations forums with the active participation of his country. He agreed with the Commission that draft article 2 should not be included. In subsequent reports, the Special Rapporteur should discuss the issue of initiative in the exercise of

diplomatic protection, so as to establish whether such protection should be exercised at the initiative of the individual or of the State concerned.

55. He welcomed the work of the Commission and of the Special Rapporteur on the draft articles on unilateral acts of States. Such acts were frequent in international relations and should therefore be regulated by means of a consensual legal instrument. The 1969 Vienna Convention on the Law of Treaties was an important point of departure for such an instrument; some of its provisions, particularly those concerning the capacity of States, persons representing the State, non-retroactivity, invalidity and, to some extent, termination and suspension, could apply mutatis mutandis to the formulation of unilateral acts.

56. He supported the current definition of unilateral acts, as contained in draft article 1, insofar as it expressly included the "intention" of the author and the legal effects which the act must produce. The idea of autonomy, understood as both independence vis-à-vis other pre-existing legal acts and freedom of the State to formulate the act, should also be included. He supported draft article 2 as proposed by the Special Rapporteur. With respect to draft article 3, which concerned persons authorized to formulate unilateral acts on behalf of the State, the corresponding provision of the 1969 Vienna Convention should be applied restrictively with respect to unilateral acts. Thus, while paragraph 1 of draft article 3 was acceptable, paragraph 2, which referred to the practice of States and other circumstances, was problematic owing to the difficulty of proving the existence of such practice or circumstances.

57. Draft article 4 referred to a situation that was perfectly conceivable in international relations, since persons other than those mentioned in draft article 3, paragraph 1, could formulate acts that entailed obligations for their States. In view of the exceptional nature of that provision, the requirement that subsequent confirmation must be given expressly was essential; the draft article should also specify that such confirmation should be made in writing to ensure that it could be proved. Draft article 5, which concerned invalidity of unilateral acts, was generally acceptable. However, the ground for invalidity laid down in paragraph 8 should include requirements similar to those of the 1969 Vienna Convention; otherwise, it could afford States too broad an opportunity to avoid international obligations. That ground for invalidity would be acceptable if it provided that the violation it referred to must be manifest.

58. With respect to reservations to treaties, the Vienna Conventions of 1969, 1978 and 1986 formed an effective basis for their regulation. However, experience had shown that some issues in that area were not adequately covered. That did not mean that the provisions of the Vienna Conventions should be altered; rather, efforts should focus on filling gaps in the existing regime by means of a guide to practice. Any amendments to the existing provisions could result in unnecessary instability or questioning of the current regime.

59. The draft guidelines on reservations to treaties helped to clear up doubts about the nature of certain unilateral statements concerning treaties. A clearer guideline should be introduced on the criteria for distinguishing between a reservation and an interpretative declaration to address the problems that arose in practice. That distinction should hinge on the effects, rather than the names, of such statements. Draft guideline 1.3.1 referred to the "intention of the State or the international organization" as a factor to be taken into account in making that distinction. However, the criteria should be as objective as possible and should refer to the effects of the two types of statements.

60. Late reservations were an interesting concept but should be very strictly regulated in cases in which they were not authorized by the treaty itself. Traditionally, reservations could only be made at the time of expression of consent to be bound, since they altered the legal effects of treaties. While that should continue to be the general rule, it was not a peremptory norm that could not be changed by the will of the parties to a treaty, which were, in a sense, the masters of the legal regime created by the treaty. Therefore, in respect of treaties that made no reference to late reservations, the admissibility of such reservations should be subject to certain conditions, such as unanimous acceptance by the parties. That unanimity requirement would be a sufficient guarantee to prevent possible abuses.

61. **Mr. Niehaus** (Costa Rica) said that the draft articles on State responsibility provisionally adopted on second reading were generally balanced and realistic. They represented a suitable codification of customary law on the subject, while including innovative elements aimed at ensuring that the regime

governing State responsibility was fair in the light of new realities in international relations.

62. He welcomed the distinction, in the draft articles, between the principles applicable to serious breaches of States' obligations to the international community as a whole and the principles applicable to less serious breaches. Likewise, he welcomed the specific distinction between the rights of States affected by serious breaches of obligations to the international community and the rights of States injured by the breach of a bilateral obligation. He also supported the inclusion of draft article 49, since it would allow any State having an interest in the fulfilment of an obligation established for the protection of a collective interest of the international community to invoke the responsibility of a State having committed an internationally wrongful act, and would also allow such a State to seek reparation of the injury suffered by the beneficiaries of the obligation breached. That rule was necessary if the regime governing international responsibility was to apply to the human rights and international humanitarian law provisions having the force of *jus cogens*, and it would strengthen the international regime for the protection of human rights.

63. The provisions on serious breaches of States' obligations to the international community as a whole should concern obligations that were essential for the protection of the international community's fundamental interests. The inclusion, in draft article 41, paragraph 2, of the additional requirement that the failure to fulfil the obligation must be gross and systematic was therefore inappropriate. In principle, the consequences stipulated in draft article 42 and draft article 54, paragraph 2, were acceptable. However, he wondered whether article 42, by establishing the obligation to pay damages, included an unnecessary punitive element. It would be preferable to indicate simply that such breaches entailed an obligation to make reparation in accordance with draft articles 35 et seq. The obligations enumerated in draft article 42, paragraph 2, could be misinterpreted, since they seemed to permit any type of cooperation aimed at ending a breach of a peremptory norm of international law. The paragraph should refer directly to countermeasures, in accordance with draft article 54, paragraph 2, and the commentary should clarify that the rule in no way legitimized the use of force except in full conformity with the letter and spirit of the Charter of the United Nations.

64. With respect to the admissibility of claims, he was pleased that draft article 45 (b), provided that only available and effective local remedies must be exhausted in order to satisfy the rule of exhaustion of local remedies, thereby reflecting, in a concise but effective way, the exceptions to that rule incorporated into customary law. He strongly supported the Commission's decision to limit the use of countermeasures as far as possible and to use them as a means of promoting negotiation, but would have preferred a complete ban on the use of countermeasures, which were unfair because they were effective only in the hands of great Powers, while countries with fewer resources and less influence could be victimized by their abuse. However, since the international community did not yet have a central authority to enforce the fulfilment of States' obligations, the usefulness of countermeasures must be acknowledged. He welcomed the balance achieved in the draft articles between customary law and innovative elements aimed at promoting the progressive development of international law.

65. Draft article 51 should contain an indication of exactly what countermeasures were prohibited. Those should include countermeasures that contravened existing rules applicable to the non-use of force, human rights and international humanitarian law, together with other peremptory norms of international law. Draft article 52 should indicate not only that countermeasures must be commensurate with the injury suffered, but also that they should be designed to induce the State concerned to fulfil the obligation in question. The Commission should consider ways of dealing with States that abused countermeasures or did not impose them in good faith. He supported the requirement, in draft article 53, that States must offer to negotiate before imposing countermeasures. Paragraph 5 of that draft article should be a separate draft article and should stipulate that, when countermeasures were suspended, those which were necessary for preserving the rights of the injured State could be maintained until the court or tribunal imposed provisional measures. He wondered whether the conditions imposed on the use of countermeasures were applicable in the case of breaches of obligations *erga omnes* or peremptory norms of international law. The negotiation requirement should be excluded in those cases.

66. He welcomed the flexibility of draft article 39, since international practice and jurisprudence had not unanimously confirmed the existence of an obligation to pay interest in all cases. Draft article 37, paragraph 2, should be redrafted to incorporate greater flexibility. He doubted the usefulness of the obsolete requirements that States should give satisfaction and guarantees of non-repetition, which were mentioned in draft articles 38 and 30 (b).

67. Although he would prefer that the draft articles should be adopted as a legally binding instrument, he would not object to their adoption as a non-binding declaration of the General Assembly to serve as a guide, in the interest of ensuring that the text would not be abandoned altogether as a result of the obstacles inherent in the negotiation of a binding instrument.

68. **Mr. Winkler** (Austria) said that the time had come to complete the work on State responsibility and to determine what form the draft articles should take. Recent practice showed a tendency to prefer General Assembly resolutions over the traditional form of a legally binding instrument. Although the latter had the advantage of legal security, it could also be unhelpful or even counterproductive in cases where a significant number of States, or States representing major regional legal systems, failed to ratify a given instrument, or where State practice developed in a different direction in the long run.

69. Considering the complexity of issues of State responsibility, negotiations on a legally binding text would undoubtedly be difficult and could endanger the delicate balance achieved in the Commission's current text. Austria was therefore in favour of adopting the draft articles as part of a General Assembly resolution. The circumstances of the adoption of such a resolution, the terminology chosen and the degree of genuine consensus would be of practical consequence for the implementation of the articles. In the resolution, the General Assembly should take note of the articles as a restatement of international law; it should not engage in any redrafting of the articles. Thus, the moral and practical force of the Assembly's endorsement would add to the professional authority of the Commission. Should that course of action be taken, some of the draft articles would have to be adapted and those on dispute settlement would have to be deleted. However, it would always be possible to resort to existing mechanisms for dispute settlement. He supported the comments of the President of the International Court of Justice on that subject.

70. The current version of the draft articles was more streamlined and balanced than previous versions. The elimination of references to certain remote possibilities had made the text more realistic, and therefore more acceptable and more likely to influence policy decisions and State practice. The deletion of some draft articles concerning primary rules of international law also represented an improvement.

71. Among the specific provisions that should be looked at more closely were those dealing with the issue of compensation for moral damage. According to most textbooks on international law, there was no material reparation for moral damage suffered by States, merely satisfaction. However, the draft articles, particularly article 31, paragraph 2, article 37 and article 38, paragraph 1, could be interpreted differently. Article 37, paragraph 2, stated that compensation should cover any "financially assessable damage". Under some legal systems, moral damages were considered financially assessable, so that lawyers from such States would interpret the provision as obligating the responsible State to pay compensation for moral damage. Such an interpretation appeared to be supported by article 38, paragraph 1, which provided for satisfaction insofar as the injury could not be made good by restitution or compensation. A change in international law introducing compensation for moral damage required a deliberate decision; his delegation doubted that such a change was warranted or practical.

72. With regard to serious breaches of essential obligations to the international community, he endorsed the change of direction away from any reference to "international crimes" and towards a more restrictive understanding of obligations *erga omnes*. The defect of the new solution was that, by defining serious breaches in article 41, paragraph 2, as those involving a gross or systematic failure to fulfil the obligation, it provided no objective way to draw the line between serious and other breaches, particularly in the areas of human rights and environmental protection, where the concept was of the most practical significance. Serious breaches entailed obligations for all States, including the obligation in article 42, paragraph 2 (c), to cooperate as far as possible to bring the breach to an end. It was unclear whether that was intended to relate to cooperation in taking countermeasures under article

54 or was a separate obligation, and whether it was subject to limitations.

73. Under article 43 (b) (ii), the notion of "injured State" was extended to "all the States concerned" in certain situations, which presumably covered some *jus cogens* norms and global agreements on environmental protection. It must be clarified, however, whether the provision was also intended to cover international human rights instruments, specifically excluded from the equivalent provision of article 60, paragraph 5, of the 1969 Vienna Convention on the Law of Treaties.

74. One of the Special Rapporteur's achievements had been to reduce the concept of obligations *erga omnes* to a viable, realistic level. The new article 49 provided for invocation of responsibility by States other than the injured State if the obligation breached was owed to a group of States, such as the parties to a multilateral treaty on human rights or the environment, or to the international community as a whole, in situations of *jus cogens* or a very few treaties of a nearly universal character.

75. Under the new article 49, States other than the injured State could request cessation of the internationally wrongful act and guarantees of non-repetition; they could even demand compliance with the obligation of reparation in the interest of the injured State or beneficiaries of the obligation breached. The concept was worth pursuing but required further thought. Since there was no provision for cooperation, various States might formulate inconsistent or even contradictory requests, and compliance with one such request and not others might further complicate the situation. At the least, article 49, paragraph 3, should include a provision on cooperation similar to that contained in article 54, paragraph 3, concerning cooperation in the taking of countermeasures. An even better solution would be to establish an obligation on the part of all States interested in exercising their rights under article 49, paragraph 3, to agree on joint requests.

76. Countermeasures as a means of obtaining compliance for obligations *erga omnes* presented a thorny problem. The draft had evolved considerably since its first reading. As it stood, States other than the injured State were not entitled to take countermeasures, unless requested to do so by the injured State, for non-serious breaches of *erga omnes* obligations. They might call for cessation and non-repetition under article 49, paragraph 2, but could do nothing to induce compliance. He doubted that that was the desired result.

77. In the case of serious breaches as defined in article 41, however, under article 54, paragraph 2, any State might take countermeasures in the interest of the beneficiaries of the obligation breached. The provision was confusing, because it covered two different situations. If the serious breach met the conditions of article 43 (b), any State concerned was an injured State and entitled as such to take countermeasures, but not, as the draft articles stood, to make requests in the interest of the beneficiaries. It would seem inappropriate for such a State to be able to take countermeasures on behalf of the beneficiaries without first having sought compliance on their behalf. To correct the situation, a provision similar to that in article 49, paragraph 2, concerning requests in the interest of the beneficiaries should be included under article 44, paragraph 2.

78. Moreover, as presently drafted, the provision in article 54, paragraph 2, created the impression that in case of a breach under article 41, any State could take countermeasures without first having made requests in accordance with article 49, paragraph 2 (b). It was arguable that such an interpretation was excluded by article 53, paragraph 1, but he felt the connection should be made explicit.

79. The cooperation in taking countermeasures referred to in article 54, paragraph 3, complicated adherence to the principle of proportionality laid down in article 52. A possible solution might be to add a provision to article 53 requiring all States intending to take countermeasures to mutually agree on them before taking them. The article, which concerned conditions relating to resort to countermeasures, needed redrafting in any event, because it referred only to the injured State. Nothing in the draft articles as they stood required a State other than the injured State to negotiate with the responsible State before taking countermeasures.

80. As worded, article 59 on the relation to the Charter of the United Nations was ambiguous. It was not clear whether it referred to the obligation to refrain from the threat or use of force or to the competence of the organs of the United Nations to deal with breaches of an obligation, and, in the latter case, whether it was attempting to establish the United Nations prior right

or parallel right to act. The text did not specify whether a Security Council objection to countermeasures as a threat to peace should prevail. The article should make it clear that countermeasures taken within the United Nations system must also be subject to the rule of proportionality.

81. **Ms. Dascalopoulou-Livada** (Greece) said that the work done on State responsibility in the past year constituted a great leap forward on the most important work of codification the Commission had ever undertaken. She firmly believed that its final form should be that of a convention. A legally binding instrument, even without a wide participation initially, was bound to have far more impact than a declaration.

82. Elimination of the articles on peaceful settlement of disputes had created a vacuum. An instrument dealing with breaches of international obligations demanded a system of dispute settlement, ideally one which provided for compulsory third party settlement with a binding outcome.

83. She regretted that the Commission had struck out article 19, which had been adopted on first reading, on the notion of an international crime committed by a State. The term "international crime" had an intrinsic deterrent value lacking in the term "serious breach of an obligation owed to the international community as a whole". Moreover, the notion of "injured State" in the draft adopted on first reading was clearer and more direct than the notion of a "State entitled to invoke responsibility" used in the current draft in connection with such serious breaches.

84. The Commission had made commendable efforts to fill the gap with new provisions in articles 34, 41, 42, 49 and 54. Although it was unfortunately not clear whether article 41 referred to obligations *erga omnes* as defined by the International Court of Justice in the *Barcelona Traction* case, or to obligations with a *jus cogens* character or to some other more limited circle of actions that would constitute State "crimes", the question was not crucial. The more important article 42, concerning the consequences of serious breaches of obligations to the international community as a whole, should be amended slightly in paragraph 2 (c) to indicate that other States should cooperate with one another as well as with the injured State to bring the breach to an end.

85. She believed that countermeasures constituted an archaic notion, one which favoured more powerful States and thus had no place in an international community based on the sovereign equality of nations. She was particularly troubled by the concept of provisional countermeasures in article 53, paragraph 3, whereby the injured State could dispense with negotiations and proceed immediately to unilateral action. The concept should be eliminated, and article 53, paragraph 4, should be made applicable in all cases. In addition, a mechanism for dispute settlement prior to imposition of countermeasures should be specifically provided for. Moreover, countermeasures should not be taken unilaterally by any State if the organized international community was seized of the matter through the Security Council. A suitable place for a provision to that effect would be in article 54, paragraph 2.

86. With regard to specific articles, the phrase in article 50, paragraph 1, "to comply with its obligations under Part Two" and the similar phrase in article 53, paragraph 1, "to fulfil its obligations under Part Two" should both be replaced by the phrase "to comply with its obligations under international law". Article 39, on interest, appeared to be sufficiently covered under article 37, paragraph 2, which stated that compensation should cover "any financially assessable damage"; a special provision on interest could therefore be dispensed with.

87. Under article 53, countermeasures might not be taken or must be suspended while negotiations were being pursued or if the dispute had been submitted to a court or tribunal with the authority to make binding decisions. However, no such provision had been made for other dispute settlement procedures, such as mediation or conciliation, which, in her view, should also cause the suspension or postponement of countermeasures.

88. She favoured retaining the term "international community as a whole" in article 34, paragraph 1, article 41, paragraph 1, article 43 (b) and article 49, paragraph 1 (b). The concept existed in international law and appeared in the Statute of the International Criminal Court.

89. Of the new topics recommended for inclusion in the long-term programme of work of the Commission, she was most interested in the topic of responsibility of international organizations. The proliferation of international organizations and their activities made the delineation of their responsibility necessary. The effect

of armed conflict on treaties also merited attention. The topic of shared natural resources of States might be suitable for consideration by the Commission as long as it did not overlap with already existing conventions or texts. Overlap could be avoided by taking a quantitative rather than a qualitative approach. The last topic proposed, risks ensuing from fragmentation of international law, although extremely interesting, did not lend itself to codification.

The meeting rose at 1.05 p.m.